

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-  
WASHINGTON REGIONAL DISTRICT IN  
MONTGOMERY COUNTY, MARYLAND

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IN THE MATTER OF:  
MUSGROVE ROAD JOINT VENTURE, L.L.P.,

Applicant

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Lee Sutherland

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M-NCPPC Staff  
In Opposition to the Application

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In Support of the Application

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Stuart Rochester

In Opposition to the Application

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Zoning Application No. G-831

Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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## I. SUMMARY

The present application involves a request to expand an existing medical office building/clinic located at the southwest quadrant of Columbia Pike (U.S. Route 29) and Musgrove Road in the Fairland area. The building currently operates as a special exception. It has three stories with roughly 38,000 square feet of space, and accommodates medical practices representing nine different medical specialties. The owners would like to expand the building and the parking lot, to allow existing physicians to expand their practices and also to attract additional medical practitioners. The building cannot be enlarged under the special exception, however, because a few years after the existing special exception was approved, the relevant section of the Zoning Ordinance was amended to limit such uses to a maximum of four medical practitioners. The amending legislation provided that existing medical clinics are conforming uses and may continue to operate, but specified that the floor area of the building may not be enlarged. Code § 59-G-2.14(f). As a result, the only way the existing building can be enlarged to allow more or larger medical practices is to change the zoning.

This case has been contentious because both Technical Staff of the Maryland-National Capital Park and Planning Commission (“MNCPPC”) and the Montgomery County Planning Board (“Planning Board”) strongly recommended denial of the requested rezoning, largely on grounds that approval would be inconsistent with the objective of the *1997 Fairland Master Plan* to retain residential zoning in the area and encourage the development of single-family, detached housing. The only community involvement in the case was opposition by the Fairland Master Plan Citizen’s Advisory Committee, which actively works to support implementation of the *1997 Fairland Master Plan*.

In addition to arguing that the present application satisfies the purpose clause of the O-M Zone and would be compatible with the surrounding area, the Applicant relies heavily on the obvious public interest in providing for readily accessible medical services. The Applicant also contends that the proposed development complies with the Master Plan. The Applicant argues that the Master Plan’s goal of encouraging single-family detached housing should not be given significant weight because (a) it has been undercut by other provisions of the plan and by a subsequent approval for senior housing in the area, and (b) the Master Plan was deficient in failing to provide adequate

space for medical offices. The Applicant also argues that two nearby properties were granted reclassifications to the O-M Zone under what it considers similar circumstances, and therefore, the present application should be approved on similar grounds. The People's Counsel, likewise, argues that the application should be granted on grounds of purpose clause compliance, compatibility and the public interest.

The Hearing Examiner agrees that providing for accessible medical services is in the public interest. That is not, however, the only public interest element in this case. Carrying out the recommendations of a duly adopted master plan to preserve and enhance the viability of a residential community also serves the public interest, as reflected in the recommendations of the Planning Board and its Technical Staff. Moreover, the Hearing Examiner is persuaded that because of potential adverse impacts on the adjoining single-family neighborhood, this application presents an incompatible plan of development and fails to satisfy the purpose clause for the O-M Zone. Accordingly, the Hearing Examiner recommends denial of the application.

## II. STATEMENT OF THE CASE

Application No. G-831, filed on November 8, 2004 by Applicant Musgrove Road Joint Venture, L.L.P., seeks reclassification from the R-90 Zone to the O-M Zone of 3.5 acres of land known Lot 2 and Lot 5, Thompson's Addition to Deer Park, 2415 and 2409 Musgrove Road, Silver Spring, Maryland, in the 5th Election District. The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, density and development standards or staging.

The application was initially reviewed by Technical Staff, who, in a report dated March 4, 2005, recommended *denial*.<sup>1</sup> The Planning Board considered the application on March 10, 2005 and, by a vote of 3 to 1, recommended *denial*. A public hearing was held on March 18 and March 28, 2005, during which evidence was presented both in support of and in opposition to the application. The record was held open for additional submissions and closed on April 29. By Resolution dated

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<sup>1</sup> The Staff Report is quoted and paraphrased liberally in Part III of this report.



June 14, 2005, the District Council extended the time for submission of the Hearing Examiner's report and recommendation to June 27, 2005.

### **III. FINDINGS OF FACT**

For the convenience of the reader, the findings of fact are grouped by subject matter. Any conflicts in the evidence are resolved under the preponderance of the evidence test.

#### **A. Subject Property**

The subject property contains approximately 3.5 acres of land located in the southwest quadrant of Musgrove Road and Columbia Pike (U.S. Route 29). It is comprised of Lot 5, a corner lot measuring about 2.77 acres, and Lot 2, adjacent to Lot 5 to the west, which contains about 0.75 acres. The combined property is irregularly shaped and fairly flat, sloping very gradually toward Route 29. It has approximately 467 feet of frontage on Musgrove Road, 127 feet of frontage facing the intersection of Musgrove Road and Route 29 diagonally, and 259 feet of frontage on Route 29.

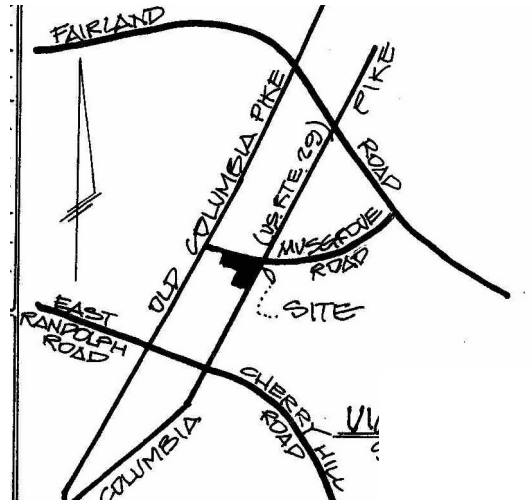
Lot 5 is developed with a three-story, brick medical office building that has a total floor area of 38,112 square feet and a surface parking facility with 192 spaces. The building is in the western part of the site, set back about 100 feet from and roughly parallel to Route 29, and about 40 feet from Musgrove Road. A wetlands-type storm water management pond is located between the building and Route 29. Landscaping consists of trees around the building and parking area.

Lot 2 contains a vacant, one-story brick house with front and rear yards and a paved parking stub. Lot 2 also contains the entrance drive for Lot 5, which is approximately 30 feet wide and passes within a few feet of the front door of the house. The house has with a two-car garage, but access to the garage is cut off by a row of evergreen trees. Lot 2 also has other, scattered trees.

Confronting to the north, across Musgrove Road, is a 35-acre Verizon facility in the I-3 Zone. It has a large building ranging in height from three stories to seven, and extensive parking lots. Confronting diagonally across Route 29 is another large Verizon facility, in the O-M Zone. Directly confronting the subject site across Route 29 is an assisted living and nursing home complex. To the west, the subject property abuts Lot 1 of Thompson's Addition to Deer Park, at the corner of

Musgrove and Old Columbia Roads, which is occupied by a single-family detached residence. To the south, the subject property confronts property owned by the Guru Nanak Foundation, which contains a single-family residential structure that is used as a Sikh Temple, a paved parking lot, and vacant, grassy land used for overflow parking.

The site's general location and shape are shown on the map below (from Ex. 61(a)).



The following photograph depicts the existing office building on Lot 5 and, in the right foreground, the entrance drive and the vacant house on Lot 2, which is partly obscured by trees.

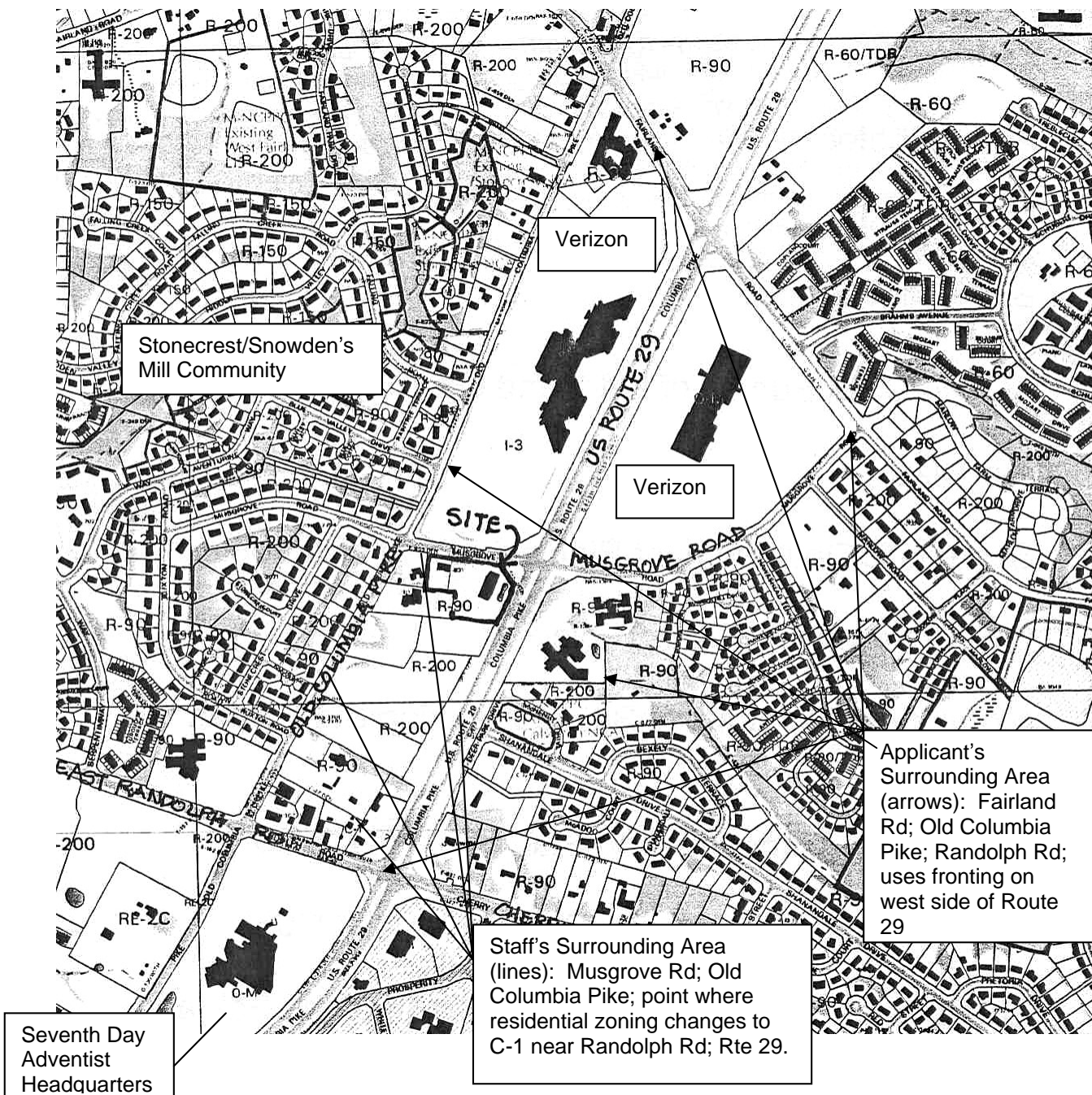
**Photo of Subject Property, Ex. 65(d)**



### B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the definition of the surrounding area takes into account those areas that would be most directly affected by the proposed development. The vicinity map below depicts existing uses in the area of the subject property and the disparate surrounding area boundaries suggested by Technical Staff and the Applicant.

### Vicinity Map, Excerpted from Staff Report, Ex. 28



In the present case, the Planning Board, Technical Staff and the Applicant's land planner made conflicting recommendations concerning the appropriate surrounding area to be considered. The question of how the surrounding area is defined is an important one for this application, because two elements of the purpose clause for the zone sought require analysis of the surrounding area. Accordingly, a detailed discussion of the issue follows.

Both Technical Staff and the Applicant's planner defined rough boundaries for the surrounding area, consisting mostly of roads. The Planning Board took a broader approach, stating that "in floating zone applications, scrutiny may be given to the neighborhood generally without that neighborhood being defined by strict boundaries, and thus the single-family residential area of Snowden's Mill and Stonecrest west of Old Columbia can be considered when gauging impact and when gauging whether the area is predominantly single-family residential in character; . . ." Ex. 31 at 2. With the exception of including the single-family residential area west of Old Columbia, the Planning Board appears to have accepted Technical Staff's recommendation regarding the designation of a surrounding area.

Technical Staff recommended designating a surrounding area bounded generally by Musgrove Road to the north, Route 29 to the east, Old Columbia Road to the west, and, to the south, the southern property line of the last residentially-zoned property in the block before the zoning changes to C-1 (Convenience Commercial). Technical Staff considered this the most appropriate surrounding area because it is the area Staff considers most directly affected by the present application. Staff reasoned that the properties within the defined surrounding area are the most directly affected for two reasons. First, they are zoned for single-family residential development (R-90 or R-200) and have the most potential to face development pressures if the present application succeeds. Second, at least some of these properties are likely to experience immediate adverse impacts, such as noise from a proposed expansion of the parking lot. Staff Report, Ex. 28 at 4.

Technical Staff was heavily influenced in its surrounding area determination by the vision set forth in the *1997 Fairland Master Plan*, which focused on enhancing the single-family detached character of the area. Zoning analyst Sandra Youla testified that based on the zoning

patterns, she saw that the Master Plan was trying to establish a single-family character on the east and west sides of Old Columbia Pike, near and including the subject site, and that the Verizon facilities were to be contained, relating more to one another than to the surrounding uses. Moreover, she observed that both Verizon facilities are separated from adjoining uses by very large parking lots and green areas. Accordingly, Ms. Youla determined that development of the subject property would have little impact on the two Verizon properties. Ms. Youla acknowledged that any site has impact to varying degrees on different properties, some near and some close, but based on the strategic importance of the subject lot as a transitional site, she felt that the most direct impact would be on residentially-zoned properties in the area. Tr. March 28 at 27-28.

Ms. Youla drew the eastern boundary of her surrounding area to exclude development on the east side of Route 29, simply because of the width of the roadway as a major highway. *Id.* at 29. She drew the western boundary of her surrounding area to exclude development on the west side of Old Columbia Pike because she felt that only the areas that would be most directly affected should be included. Similarly, Ms. Youla acknowledged an interrelationship between the subject property and the C-1 commercial area at the southern end of the block, fronting on Randolph Road. However, she excluded the C-1 land from the surrounding area because she felt that those properties would not be among those “most directly affected” by the proposed rezoning. *Id.* at 90-91.

The Applicant’s land planner, Phil Perrine, recommended a surrounding area considerably larger than Staff suggested, extending from Old Columbia Pike on the west to properties fronting on the east side of Route 29, and from Randolph Road on the south to Fairland Road on the north. Mr. Perrine explained that in his view, the surrounding area for a floating zone case should capture “those uses that have a significant relationship to the subject property.” Tr. March 18 at 92. These may be properties that are affected by the subject property or have an effect on it. Mr. Perrine considers the nature of the proposed development, the scale and height of the building, how far away it will be visible, and the nature of the proposed site activity and related traffic. In the present case, he determined that all of the adjacent and confronting properties should be within the surrounding area, despite the buffers on the Verizon facility and the width of Route 29. Mr. Perrine acknowledged that

at the far northern reaches of the two Verizon sites, there is no significant relationship with the subject property. He included both sites in their entirety, however, because he normally draws his line at roads or natural features.

Mr. Perrine included the C-1 commercial area at the southern end of the block that includes the subject property because the local commercial uses in that area serve residents and workers in the rest of the surrounding area, and because he considers Randolph Road a more logical stopping point than drawing a line where the zoning changes from residential to commercial. Tr. March 18 at 109.

Mr. Perrine did not extend the surrounding area across to the west side of Old Columbia Pike because he does not perceive a significant relationship between the subject property and the single-family residential neighborhood to the west, the Stonecrest/Snowden's Mill subdivision. Mr. Perrine noted that the subject property has little impact on the Stonecrest/Snowden's Mill community in terms of sight and sound, since the building is located some 400 feet from Old Columbia Pike. The expanded parking lot would be closer to Old Columbia Pike, but would be screened by perimeter vegetation. Moreover, the Applicant's traffic study indicates that the proposed expansion would have no adverse impact on traffic conditions in the area, particularly within the Stonecrest/Snowden's Mill community.

Mr. Perrine's recommended surrounding area boundaries were informed by the surrounding areas designated in two past zoning cases in the vicinity of the subject property, both of which resulted in reclassifications to the O-M Zone. Mr. Perrine reported that LMA No. G-678, decided in 1991, rezoned what is now the Verizon property east of Route 29, diagonally across from the subject property. The surrounding area established in G-678 extended across Route 29 to Old Columbia Pike on the west, midway through the residential zoning on the east, north to the southern boundary of the proposed Intercounty Connector, and south to Randolph Road. Mr. Perrine noted that it went from road to road, Route 29 to Old Columbia Pike, and extended to roads or other significant boundaries in the other directions. He also stated that LMA G-406, decided in the mid-1980s, involved a property owned by the Seventh Day Adventist Church, south of Randolph Road

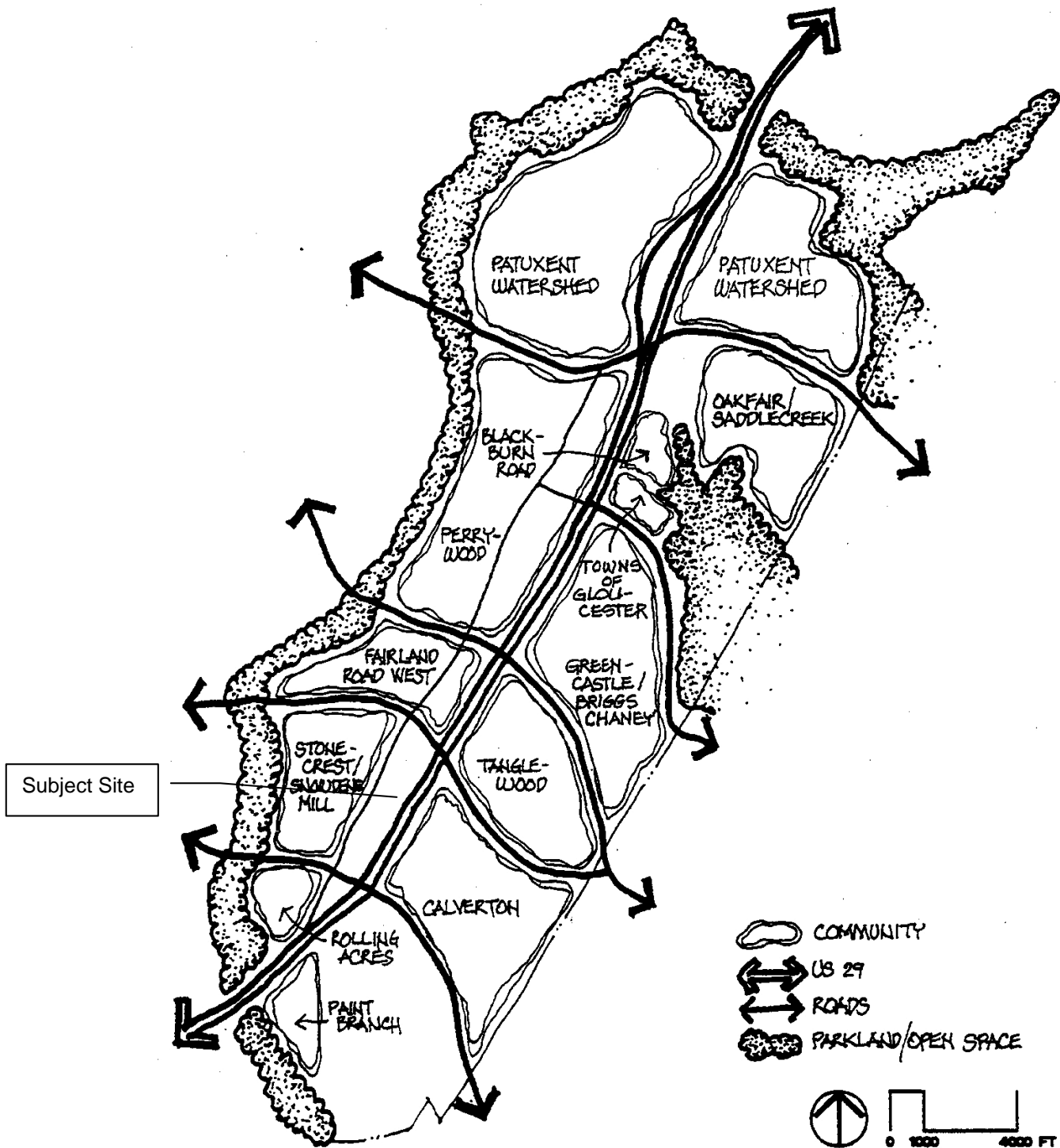
between Route 29 and Old Columbia Pike. In that case, the subject property itself extended from Route 29 to Old Columbia Pike, and the surrounding area reached from east of Route 29 to west of Old Columbia Pike. Both of those cases involved larger land areas and larger buildings than the present case. However, Mr. Perrine found the surrounding area descriptions instructive.

Mr. Perrine also found guidance in the Master Plan with regard to defining the surrounding area. The Master Plan divided the planning area into “communities,” which were identified on Figure 15, page 33, reproduced on the next page. See Ex. 46. The subject property is not part of any of the communities identified on Figure 15. It is in an area just east of the community identified as Stonecrest/Snowden’s Mill, but that community’s eastern border stops at Old Columbia Pike. Mr. Perrine notes that this presents a distinct contrast with most of the other communities identified in the Master Plan; most of the communities west of Old Columbia Pike are shown extending across Old Columbia Pike to Route 29. This, in Mr. Perrine’s view, supports his decision to exclude properties west of Old Columbia Pike in the surrounding area in this case, as they are not part of the same “community.” Tr. March 18 at 111-115.

As all of the participants in this case acknowledged, the concept of a “surrounding area” in floating zone cases has been likened to the ripples that run out from a pebble tossed into a lake. The ripples are strongest where the pebble hits the water, and become more and more attenuated as they get farther from the point of impact, until they fade into insignificance. A change in land use or zoning tends to have the most significant impact on properties in close proximity to the subject site, and lesser impacts on properties farther away. The challenge for a reviewing body is to decide where to draw the line – when to decide that the relationship with the subject property is no longer significant.

In the present case, the Hearing Examiner finds that Technical Staff has defined the surrounding area too narrowly, and Mr. Perrine has defined it too broadly. As a threshold matter, the undersigned does not feel constrained to follow the surrounding area designations discussed by Mr. Perrine, which were used in cases that were decided more than ten years ago, both of which involved significantly larger land areas and more intense uses than those at issue here.

Communities of Fairland Identified in Master Plan, Figure 15 (Ex. 46)



Ms. Youla and Mr. Perrine agree that Old Columbia Pike should be considered the western boundary of the surrounding area. Only the Planning Board found that the single-family neighborhood west of Old Columbia Pike should be considered part of the surrounding area for



purposes of this case. The Hearing Examiner agrees with the Planning Board on this point. The Planning Board correctly points out that the concept of a “surrounding area” in a floating zone case is a flexible one, and need not have strict boundaries. Old Columbia Pike is a narrow road with only one travel lane in each direction, so the neighborhood west of it is not far removed from the block that includes the subject site. Moreover, the intersection of Old Columbia Pike and Musgrove Road serves as a main entrance into the Stonecrest/Snowden’s Mill community, with a stone sign identifying the subdivision. The evidence supports the conclusion, voiced by the Planning Board, Technical Staff and the Chairman of the Fairland Master Plan CAC, that the subject property is a gateway to the Stonecrest/Snowden’s Mill community, creating a significant relationship between the property and the adjoining community. The evidence also supports the conclusion that the single-family residential character of this neighborhood is fragile, having been subjected to the increasing pressures of nearby non-residential development. That vulnerability makes the Stonecrest/Snowden’s Mill community more likely to be affected by the proposed zoning reclassification.

The evidence does tend to show that existing and anticipated future landscaping would largely screen the building and proposed addition from view, except from the intersection of Musgrove Road and Old Columbia Pike. It is also undisputed that when the Master Plan identified the Stonecrest/Snowden’s Mill community, the eastern boundary of the community stopped at Old Columbia Pike, rather than extending all the way to Route 29, which would have included the subject property and its block. Technical Staff explained that this line was drawn largely because the interconnected residential streets did not extend past Old Columbia Pike, and Staff considered that interconnectedness an important element in defining communities. The Hearing Examiner does not consider the Master Plan’s community boundaries to be dispositive of where the impacts of a proposed rezoning might be significant. For the reasons cited in the previous paragraph, the Hearing Examiner concludes that the surrounding area in this case should extend west of Old Columbia Pike, including at least those homes that front on Old Columbia Pike.

To the north, Technical Staff suggested Musgrove Road as a surrounding area boundary, and Mr. Perrine suggested Fairland Road. The former approach is not fully satisfactory because it would exclude confronting property that could be affected by the rezoning and expansion, particularly the increase in site traffic. The latter approach would include large amounts of land that Mr. Perrine himself acknowledges have little, if any, relationship with the subject property. Nonetheless, the potential for direct impact on users of the Verizon facility persuades the Hearing Examiner to follow Mr. Perrine's suggestion on this point, including the Verizon site within the surrounding area while acknowledging that only the southern part of the site should be given any weight in assessing the impacts of the rezoning.

To the east, Ms. Youla recommended cutting off the surrounding area on the west side of Route 29, while Mr. Perrine would include properties fronting on the east side. The Hearing Examiner found Mr. Perrine's explanation that he included these properties because they can see the subject property unpersuasive. Route 29 is a major, six-lane divided highway with heavy traffic volumes. The minor visual impact that the subject property may have on properties on the other side of Route 29 does not, in the undersigned's view, rise to the level of a significant relationship.

On the other hand, the Hearing Examiner is persuaded by Mr. Perrine's argument that the entire block in which the subject property is located should be included in the surrounding area, including the C-1 commercial area near Randolph Road. The neighborhood commercial uses in this area are available to serve employees and patients using the subject property and could be favorably affected by increases in employees and patients. Moreover, the future development of these properties could be affected by a successful zoning application on the subject site, which could change the character of the area sufficiently to increase development pressures. Ms. Youla's argument that the residentially zoned properties would be most directly affected because they are most vulnerable to development pressure was not sufficiently persuasive to overcome the logic of including the entire block and the evidence of a significant relationship between the subject property and the commercial area in question.

In sum, based on a preponderance of the evidence pertaining to the designation of a surrounding neighborhood, the Hearing Examiner designates a surrounding area for purposes of this application that extends roughly from Route 29 on the east to Randolph Road on the south and includes (i) the Verizon site immediately north of the subject property, acknowledging that the northern portion of that site has no real relationship with the subject property, and (ii) the Stonecrest/Snowden's Mill community west of Old Columbia Road, acknowledging that the homes fronting on Old Columbia Pike would be most affected by this application. This surrounding area as thus described may be seen on the aerial photograph on the next page.

The surrounding area as designated includes a mix of uses as described below:

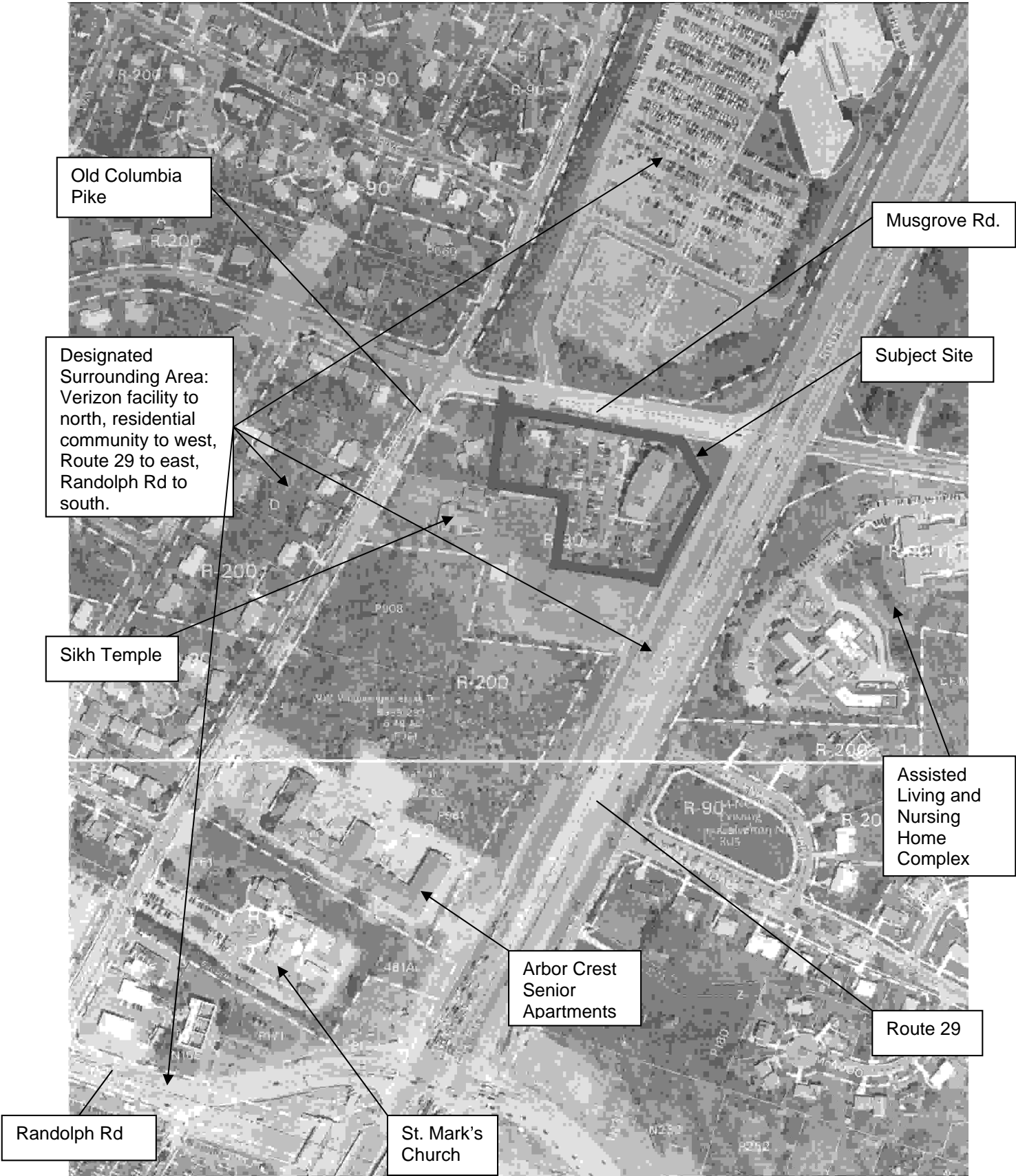
- ◆ Medical office building on Lot 5 of subject property in R-90 Zone.
- ◆ Vacant single-family detached structure on Lot 2 of subject property, in R-90 zone. Desirability for residential use heavily impacted by proximity of entrance drive.
- ◆ Single-family detached residence on southeast corner of Musgrove and Old Columbia Roads, in R-90 Zone.
- ◆ Single-family homes west of Old Columbia Pike, classified primarily under the R-200 Zone but with areas of R-90 and R-150 zoning.
- ◆ Two religious institutions with associated parking, both in the R-90 zone.
- ◆ 11-acre tract of undeveloped land in the R-200 Zone.<sup>2</sup>
- ◆ Arbor Crest Senior Apartment Community, operating as a special exception in the R-200 Zone.
- ◆ Automobile filling station and other neighborhood commercial uses in the C-1 Zone.
- ◆ Verizon facility north of the subject property, in the I-3 Zone, particularly the portion that fronts on or is close to Musgrove Road.

Beyond the limits of the surrounding area are the large Verizon facility to the northeast, in the O-M Zone; the assisted living and nursing home facilities on the east side of Route 29, which are in the R-90/TDR Zone and abut extensive single-family neighborhoods in the R-90 and R-200 Zones; and large office uses south of Randolph Road in the R-200, O-M and I-1 Zones.

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<sup>2</sup> This land was the subject of special exception No. S-1247, which permitted a headquarters building for the Machinists' Union. The special exception was never implemented, and the time for implementation is long past.

Aerial Photo Showing Designated Surrounding Area  
Excerpted from Ex. 63 and Annotated



The Applicant submitted the photographs that follow to depict some of the uses in the surrounding area and the limited visibility of the subject property from Old Columbia Pike.

**Looking up Musgrove Road from Just North of  
Musgrove Road/Old Columbia Pike Intersection**



**Musgrove Road/Old Columbia Pike Intersection Seen from  
Slightly West of Intersection. Brick House on Right is Lot 1. Ex. 62(f)**



**Looking Straight up Musgrove Road from Intersection with Old Columbia Pike.  
Lot 2 House behind Tall Evergreens. Corner of Lot 1 House Barely Visible to Right.**

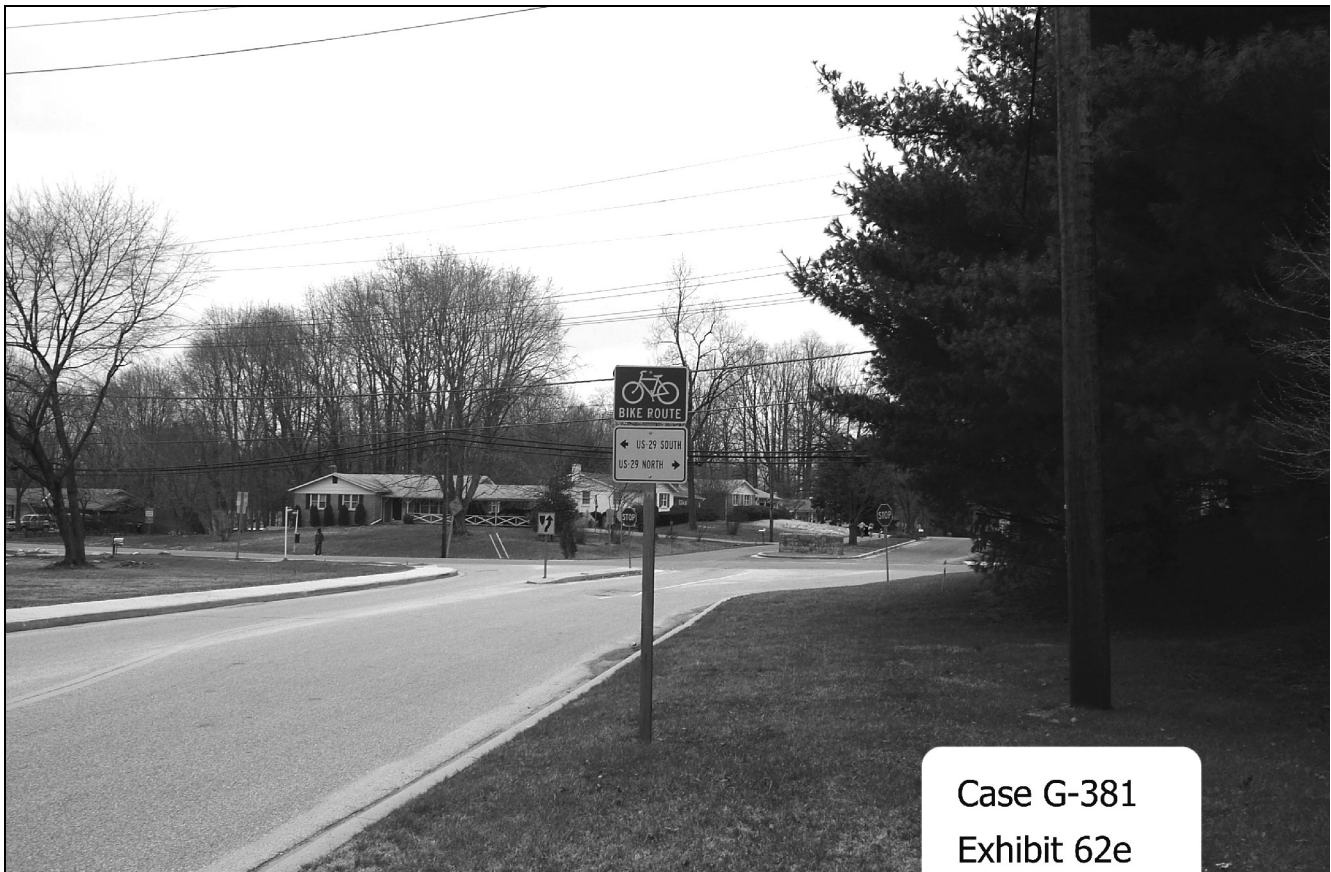


**View of House on Lot 2, Through Evergreens, from Old Columbia Road Sidewalk**





**Musgrove Road/Old Columbia Pike Intersection Seen from Verizon Entrance,  
Slightly East of Intersection. Houses are in Stonecrest/Snowden's Mill**



**Entrance to Sikh Temple on Old Columbia Pike**



The character of the surrounding area plays an important role in this case, because the purpose clause for the O-M Zone states, among other things, that the zone is “not intended for use in areas which are predominantly one-family residential in character.” Code § 59-C-4.310. The Hearing Examiner agrees with Mr. Perrine that if an area is basically developed and stable, its character is determined primarily by existing land uses, with master plan recommendations as a secondary indicator. See Tr. March 18 at 107.

Having adopted the Planning Board's conclusion that the Stonecrest/Snowden's Mill community should be considered part of the surrounding area, the Hearing Examiner also adopts the Planning Board's reasoning that this community should be considered in assessing the character of the area. Taking into account the entire Stonecrest/Snowden's Mill community, which is very large, would result in a conclusion that the surrounding area is overwhelmingly single-family residential in nature. Even taking into account only the residential properties fronting on Old Columbia Road, their number is sufficient to support a conclusion that the surrounding area is predominantly single-family residential in character, when considered in combination with (i) the limited single-family residential properties within the subject block (one property that is used for single-family residential purposes (Lot 1), and one (Lot 2) that contains a vacant single-family structure whose desirability as a residence is compromised by a 30-foot drive aisle passing within a few feet of the front door); (ii) 11 acres of vacant land zoned for single-family residential use; and (iii) the Master Plan objective to maintain and enhance the single-family residential character of the area.

### **C. Zoning History**

The lots that comprise the subject property were classified under the R-200 Zone as part of the 1958 County-wide comprehensive zoning. Both lots were reclassified to the R-90 Zone in SMA G-337, adopted in 1982. This zoning was reconfirmed by SMA G-563 in 1987. Lot 5 was the subject of rezoning application G-588, which sought to rezone from R-90 to O-M and was withdrawn without prejudice in 1988. R-90 zoning was again confirmed for both lots by SMA G-747, in 1997.

On May 23, 1984, the Board of Appeals approved special exception No. S-906 to permit a medical clinic on Lot 5. The Opinion granting the special exception stated that Holy Cross



Hospital wished to negotiate a master lease of the premises, under which the hospital would lease the top two floors to medical and dental practitioners and would use the first floor for radiology, laboratory and pharmacy facilities, as well as therapeutic services such as an outpatient clinic for minor surgery and urgent care. See Ex. 34(a). The testimony at this hearing indicated that while Holy Cross did have a lease for some period of time, their full plan did not materialize, and the building has been used solely for medical offices, without the diagnostic and therapeutic uses anticipated.

After approval of the special exception, the application proceeded to subdivision review. During that process, the Planning Board required the property owners to move the access drive for the property off of Lot 5, onto the adjacent Lot 2 (which was or soon became under the same ownership), so that the driveway would be directly opposite the access drive for the Verizon facility (then C&P Telephone) across the street. Lot 2 was not included as part of the special exception, although the special exception was modified in 1985 to approve the revised site plan showing the access through Lot 2. See Exs. 34(c) (modification opinion) and 55 (approved preliminary plan).

#### **D. Proposed Development**

The Applicant proposes to enlarge the existing building by constructing an addition at the southeast corner of the building, near the open area that the Sikh Temple uses for overflow parking. The addition would be the same height as the existing building, and would use the same materials and architectural design. It would extend eastward to within approximately 43 feet of the existing right-of-way for Route 29, and would sit on land that is currently part of the surface parking lot. Internal corridors would connect each floor of the addition to the corresponding floor of the existing building. The total square footage of the addition is proposed at 14,174 square feet, while the building currently contains approximately 38,112 square feet of space; the addition would increase the overall square footage to approximately 52,286 square feet.

The existing medical office building houses medical practices representing nine different specialties (the record does not indicate the total number of medical practices or physicians). The Applicant desires to expand the building both to allow existing tenants to expand, and to accommodate additional medical practitioners, including potentially medical sub-specialties that are

not currently represented in the building. To provide enough parking for the increased number of employees and patients, the Applicant proposes to tear down the vacant house on Lot 2 and use that lot for additional surface parking. The west side of the new parking area, adjacent to the single-family home on Lot 1, would be screened by a fence, if the Planning Board so directs at site plan, and by landscaping. Vehicular access to the site would not change.

The parking lot is currently lit by a number of light poles, all of which are shielded and directed downward to avoid light spillage onto other properties. The Applicant proposes to use the same types of fixtures in the expanded parking lot.

### **E. Schematic Development Plan and Binding Elements**

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, i.e. elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment.

In this case, the binding elements limit the use to “Medical Office per O.M. Zone”; limit the building coverage to 11.4% (only slightly higher than the current 10.5%); limit FAR to 52.286 square feet or 0.34 (only slightly higher than the current 0.31); limit building height to three stories/36 feet; and specify 267 parking spaces, five more than required for the specified square footage. See Ex. 61(a). The SPD also specifies as a binding element that cross easements will be recorded on Lots 2 and 5 to provide ingress, egress, common parking, maintenance and utilities for both

properties; and that the Applicant will provide traffic mitigation/improvements as required by applicable governmental authorities, before the issuance of occupancy permits.

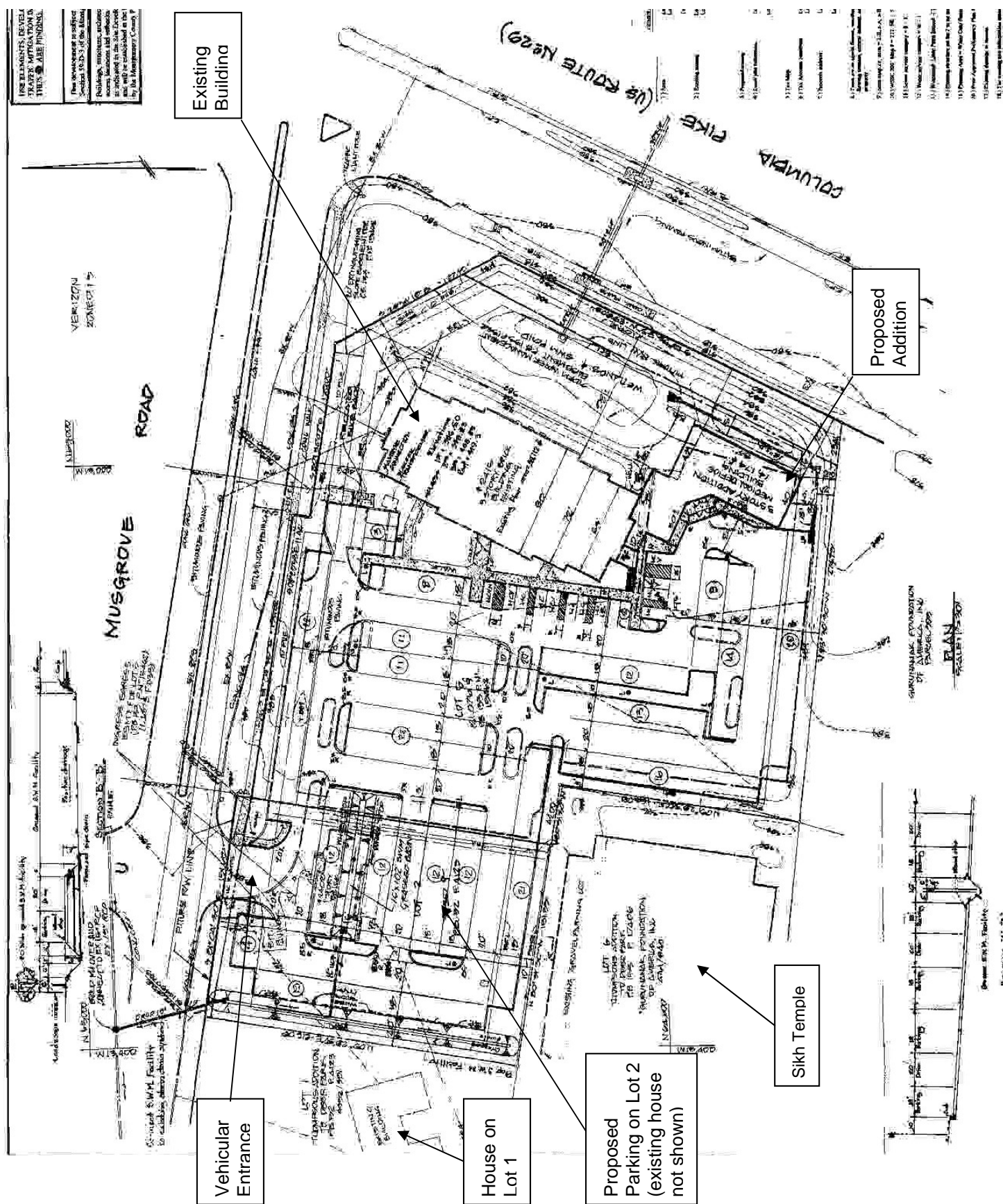
Reproduced below is a table from the SDP that show compliance with the development standards for the zone and indicates which elements are binding. The graphic portion of the SDP is provided on the next page, with additional textual portions following.

**Binding Elements Table from SDP, Ex. 61(a)**

SITE DEVELOPMENT DATA			
ITEM	EXISTING PROPERTY R- 90 ZONE SPECIAL EXCEPTION S - 906 (lot 5)	PROPOSED O.M. ZONE REQUIRED/ ALLOWED	PROPOSED PROPERTY O. M. ZONE (Lots 2 & 5)
Use	Existing Medical Offices under Special Exception S-906	-	⊗ Medical Office Uses per O.M. Zone.
Property Area	121,076 sq. ft. or 2.776 ac.	N/A	⊗ 153,943 sq. ft. or 3.535 ac.
Building Coverage	12,704 sq. ft. or 10.5 %	60% maximum or 92,366 sq. ft.	⊗ 17,538 s.f. or 11.4 %
Paving Coverage	53,092 sq. ft. or 43.9 %	-	80,500 s.f. or 52.3 %
Green Area	55,280 sq. ft. or 45.6 %	10 % minimum or 15,394 sq. ft.	55,905 s.f. or 36.3 %
Impervious Area	65,796 sq. ft. or 54.4 %	90 % maximum or 138,549 sq. ft.	98,038 s.f. or 63.7 %
F.A.R.	38,112 sq. ft. or 0.31	1.5 maximum or 230,915 sq. ft.	⊗ 52,286 s. f. or 0.34
Building Height	3 Story or 32.8 ft.	5 Story or 60 ft.	⊗ 3 story or 36 ft.
Setbacks	Street (Rte. 29)= 98.5 ft. Street (Musgrove)= 40.7 ft.  South - side = 130 ft. +/- West - rear = 141 ft. +/-	Street = 15 ft. min. " = 15 ft. min.  Adjacent residential zoned property = 1/3 feet of height or 36/3 = 12 ft.	Rte. 29 = 16' Musgrove = 40.7' South = 20' West = 142'
Parking	191 spaces required 192 spaces provided	Medical office use @ 5/ 1,000 s.f. of gross floor area: 52,286 s.f./ 1,000 s.f. x 5 = 261.4 spaces. Say 262 spaces	⊗ Handicapped- Van = 4 Handicaped = 8, total H.C. = 12 Regular = 255 TOTAL = 267

USE ELEMENTS, DEVELOPMENT STANDARDS AND  
TRAFFIC MITIGATION IMPROVEMENTS SHOWN  
THUS ⊗ ARE BINDING.

### Schematic Development Plan, Ex. 61(a)



### Additional Textual Items from SDP

This development is subject to Site Plan approval pursuant to Section 59-D-3 of the Montgomery County Zoning Ordinance.

Buildings, structures, architectural compatibility, parking, access locations and setbacks are illustrative only except as indicated in the Site Development Data table at right, and will be established at the time of the Site Plan approval by the Montgomery County Planning Board

#### PURPOSE NOTE:

The purpose of this plan is to accompany a petition to request a change in zoning from the R-90 zone to the O.M. Zone. This plan covers both Lot 2 and Lot 5, Thompson's Addition to Deer Park. Both lots are in common ownership.

⊗ Cross easements will be recorded on Lots 2 and 5, Thompson's Addition to Deer Park to provide ingress, egress, common parking, maintenance and utilities in common to both properties.

#### ⊗ BINDING TRAFFIC MITIGATION

The Applicant will provide, subject to governmental approval, traffic mitigation/improvements as required by the applicable governmental authorities

All traffic mitigation/improvements shall be installed or implemented prior to the issuance of occupancy permits for the subject property.

### F. Master Plan

The subject property is located within the area covered by *the 1997 Approved and Adopted Fairland Master Plan* (the "Master Plan"). Compliance with the vision and specific recommendations of the Master Plan is a central issue in the case. The following section describes in some detail the varying interpretations of the Master Plan offered by the Planning Board and its Technical Staff, on one hand, and by Mr. Perrine on the other.

#### 1. Planning Board and Technical Staff

The Planning Board recommendation cites several factors that were important to the three members who voted to recommend denial, including the following concerning the Master Plan:

[T]he master plan recommendation is to keep the area in single-family residential zoning and to encourage the development of detached single-family residential housing, particularly on the remaining vacant land in the area, and that recommendation is clear and explicit and should be honored...

Ex. 31 at 1.

Technical Staff describe two Master Plan objectives: (1) providing for as much new detached housing as could be accomplished on remaining vacant properties, and (2) addressing conditions where existing non-residential uses might create potential for land use changes. See Memorandum dated February 25, 2005 from Piera Weiss to Sandra Youla, attached to Staff Report, Ex. 28 (“Master Plan Memo”). Staff notes that these goals were particularly important along Route 29, the major highway that bisects the planning area. Staff explains the Master Plan recommendations and their basis as described below (see Master Plan Memo at 2-3):

- During the Master Plan process, Staff analyzed the grade-separated interchanges that SHA proposed along Route 29, including the effect of specific interchange designs on existing and proposed land uses; considered the influence that existing special exceptions and higher-intensity non-residential uses between Old Columbia Pike and Route 29 had already exerted on adjacent properties and surrounding single-family residential communities; and studied the suitability of vacant, residentially zoned land, especially between Old Columbia Pike and Route 29, for single-family development.
- The above analysis led to several zoning recommendations for properties on Old Columbia Pike and between it and Route 29, specifically lowering residential densities to encourage detached housing and “strengthen the edges of residential development along Old Columbia Pike.” Master Plan Memo at 2. This was particularly important at the east/west roads crossing Old Columbia Pike and Route 29, where there has been “a long history of rezoning and special exception requests.” *Id.*
- The subject property is identified as “clinic” on Figure 23 of the Master Plan, which depicts the Stonecrest/Snowden’s Mill community and uses in the immediate vicinity. The accompanying text describes the subject property as follows: “The Holy Cross medical offices/clinic, located on Musgrove Road, were approved as a clinic by special exception in 1984. (The Zoning Ordinance was amended in 1989

to restrict future clinic special exceptions [sic] use to a maximum of four practitioners.)” Master Plan Memo at 2, quoting Master Plan at 52.

- The Master Plan stated that the Stonecrest/Snowden’s Mill community “ . . . contains over 850 housing units. The majority, 650, are single-family detached. . . The average density is three units per acre.” Master Plan at 52. The Master Plan also identified an 8-acre tract of vacant land, called Area 28, that had been approved for a special exception (despite a denial recommendation from the Planning Board) for a Machinist Union’s headquarters.<sup>3</sup> Following delays in subdivision approval, the owners decided to relocate to Prince George’s County. Area 28 had the potential to either destabilize the edge of the surrounding community or provide the last place for single-family housing. “After careful consideration of the surrounding properties and relationship of Area 28, the master plan recommended rezoning from R-90 to R-200 to reduce maximum residential densities, provide adequate setbacks and buffers along Route 29 and provide buffers between existing institutional and special exception uses.” Master Plan Memo at 2-3.
- The Master Plan made a similar recommendation in Rolling Acres, the community immediately south of Stonecrest/Snowden’s Mill, where there was a 22-acre tract that included a historic site. That area also could provide more single-family detached housing, or destabilize the edge of the surrounding neighborhood if zoned for non-residential uses. The Master Plan recommended removal of TDRs to create incentives for detached housing and encourage preservation and reuse of the historic site. Master Plan Memo at 3.
- The Master Plan also made recommendations for Old Columbia Pike that were intended to preserve the established residential character along much of its length.

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<sup>3</sup> This property was described by all parties during this hearing as containing 11 acres, not 8. Viewing Figure 23 in light of the testimony, the 11-acre figure appears to be the result of combining Area 28 with vacant land immediately to the north that is a separate parcel, but also owned by the Guru Nanak Foundation.

These recommendations included reclassifying Old Columbia Pike from to a primary residential road where it was classified as a business district street, maintaining existing right-of-way widths where it was already classified as a primary residential road, and not providing direct access from Old Columbia Pike to the proposed Inter-County Connector<sup>4</sup>. Staff Reports that Old Columbia Pike is classified as a primary residential road, and sidewalks were recently constructed along its entire length, without widening the right-of-way or the road paving, to maintain residential character in conformance with the Master Plan. See Master Plan Memo at 3, Memo from Transportation Staff, attached to Staff Report, at 3.

Technical Staff notes that master plans contain a land use concept or vision, which underscores the land use recommendations. Staff states that there was "a dramatic change in land use policy in the eastern county between the 1968 Fairland-Beltsville Master Plan, under which many of the non-residential land uses in the area of the subject property were approved and developed, and the current *1997 Fairland Master Plan*. The 1968 plan envisioned a corridor city straddling the boundary between Prince George's County and Montgomery County near Briggs Chaney and Fairland Road, slightly north of the subject property. That plan recommended employment uses along Route 29 and included a photograph of the Verizon facility diagonally across Route 29 from the subject property, which was already in existence.

Staff reports that the next master plan, in 1981, envisioned Route 29 as a transit-serviceable corridor, with new employment areas south of Randolph Road. To serve the light-rail busway proposed in the plan, the plan recommended increased residential density along Route 29, with medium-density single-family residential areas on the west side of Route 29 between the ICC (north of the subject site) and Randolph Road (south of the subject site). Ten years later, the *1990 Trip Reduction Amendment to the 1981 Master Plan* removed or greatly reduced the optional TDR and PD residential densities and recommended limit employment growth due to lack of road capacity.

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<sup>4</sup> Transportation Staff at the MNCPPC report that the ICC is planned to cross Route 29 at an interchange just north of Route 29's intersection with Fairland Road. See Transportation Memo at 2.



Staff reports that in 1992, Verizon applied for O-M Zoning for its existing facility diagonally across Route 29 from the subject site, which was zoned C-O on the interior portion with the building and parking lot, and R-200 on the surrounding landscaped area. The Council approved O-M zoning, limited potential expansion, and approved a binding element that left the entire green space intact, “thereby ensuring continued compatibility with the residential surroundings.” Master Plan memo at 4.

Staff notes that the nursing home complex directly across Route 29 from the subject site contains two buildings, a nursing home and an assisted living facility, both of which were approved as special exceptions in the late 1980s and early 1990s, before the *1997 Fairland Master Plan*. Staff states that these uses “were deemed compatible with the surrounding neighborhood because of the nature of the use (residential) and the layout and circulation did not impact existing residential development.” Master Plan Memo at 4-5.

Staff also discussed the senior housing facility south of the subject property, which was the only request for a land use change between the *1997 Fairland Master Plan* and the subject application. Staff states that after two years of working with the community, the petitioner in the senior housing case received approval in 2003. The community supported the application, although it added density and multi-family housing to the neighborhood, because of a perceived need for moderately priced, independent living rental units for seniors in the area. Staff reports that many in the community were dismayed during construction, because the building “did not resemble the drawings presented at the various community meetings.” Many find it too big for the site and less residential in character than what the developer had described. This increases community concern about the present application, which community members believe would “irrevocably change the character of the residential neighborhood and provide services that are of little benefit to the surrounding community.” Master Plan Memo at 5.

Technical Staff emphasized that the Master Plan, after detailed analysis of the entire planning area, recommended reinforcing the single-family residential character of the area and providing for more single-family opportunities than were possible under the 1981 master plan. Master

Plan Memo at 6. Staff observes that single-family uses are dominant in the Stonecrest/Snowden's Mill community, and that all the land area in the same block as the subject property is zoned for residential use, except for the relatively small area at the Randolph Road end of the block that is in the C-1 Zone. Staff summarized their Master Plan conclusions thus:

To grant O-M zoning at the corner of Musgrove Road and US 29 would introduce a new zoning pattern into a one-family residentially zoned area that has been residential since comprehensive zoning was place in 1958, and reconfirmed in both the 1981 and 1997 master plans. A floating zone introduced into this area based on a finding of compatibility would encourage additional requests for non-residential zoning and development on any vacant land or underdeveloped [land]. The adjacent residential property that was the subject of [an unsuccessful rezoning request in 1969] would doubt[less] be the subject of a future rezoning request if O-M zoning is granted to the subject parcel.

Master Plan Memo at 6-7.

## **2. Applicant's Land Planner**

Mr. Perrine's basic conclusion is that the proposed rezoning is consistent with the Master Plan, which recognized that the subject property was in commercial use pursuant to a special exception; recommended continuation of the existing zoning, as master plans often do where a special exception exists; and depicted Lot 5 with a commercial designation on the Master Plan's land use plan. See Ex. 17 at 2; Tr. March 18 at 135. He opined that in light of the different indications for the property in the text (recommending increased single-family detached development) and on the land use plan, he views the commercial land use recommendation on the land use plan as more appropriate because it would conform to what he views as the "basic mixed-use character" of the Route 29 corridor that is depicted in the Master Plan. *Id.* at 136-38. Mr. Perrine noted that the existing use is only 20 years old, and is useful both to the community and to the owner, so there is no reason to change it. He also noted that the Master Plan recommends continued office and institutional uses along Route 29.

As described in Part 1 above, Technical Staff placed little weight on the Master Plan's specific references to the subject property, relying instead on the broader recommendations discussed at length in the Master Plan Memo. Staff characterized the references to the subject

property, both in the text and on the Land Use Plan, as descriptions of an existing use, rather than recommendations.

Mr. Perrine and Applicant's counsel raised other arguments that were designed to support a departure from the Master Plan's recommendations for more single-family detached development. These may be summarized as follows:

- The Master Plan's recommendation to downzone the large vacant area south of the subject property (Area 28) from R-90 to R-200 was not logical, if the goal was really to increase the amount of single-family detached housing, because the higher density of the R-90 Zone would allow 39 single-family homes, while the R-200 would permit only 22. Mr. Perrine acknowledged that the R-90 Zone standards permit a higher percentage of townhouses than allowed in the R-200 Zone. He suggested, however, that the Master Plan could have recommended preserving the R-90 zoning, while imposing a limitation on the use of the cluster option to encourage detached rather than attached units. (Technical Staff responded to this argument by stating that they try to avoid that level of detail about a particular property in a master plan, finding it more appropriate to use general recommendations that will work with the Zoning Ordinance as it changes over time. Tr. March 18 at 165.)
- The Master Plan was deficient in not providing adequate space for medical offices such as the subject use. The Master Plan did not specifically discuss providing access to medical services, and only about three percent of the 8,265 acres in the planning area were recommended for zones that would permit professional medical offices of the type at issue here. See Ex. 152; Tr. March 18 at 159. Given that the population in the Fairland area nearly tripled between 1990 and 1997, the Master Plan should have recognized a greater need for medical services. In fact, the amount of land

in the planning area that was classified under a commercial zoning category that would typically support medical offices increased by only five acres in the sectional map amendment that followed the Master Plan.

- The Master Plan stated that employment growth in the Fairland area would “probably be generated primarily from developed properties that have not reached maximum potential.” Master Plan at 25. Mr. Perrine opined that the subject property has not reached its maximum development potential, and that it fits into the Master Plan’s expectation for where employment growth would take place. Tr. March 18 at 150-52.
- The consideration due to the Master Plan’s single-family home objective diminished with the approval of the senior housing facility south of the subject site, for which the Planning Board recommended approval and the Board of Appeals granted special exception approval. Given that this facility was found compatible with the general neighborhood (a required finding for approval of a special exception), the development proposed here should also be found compatible.

#### **G. Effect of Potential Interchange Improvements**

The Maryland State Highway Administration (“SHA”) has proposed the construction of grade-separated interchanges at all east-west road crossings on Route 29. These interchanges were proposed during the preparation of the Master Plan, and some have already been built. Major interchanges are being done first, and a complete reconstruction of the intersection of Route 29 and Randolph Road was under way at the time of the hearing in this case. SHA reports that the above-grade interchange proposed for Musgrove Road is currently funded for design and right-of-way, and design efforts are expected to be completed by the summer of 2006. See Ex. 68. The Applicant in this case testified that SHA has contacted him about acquiring property from the subject site that would be needed for the new right-of-way. The Applicant’s site planner, Mr. Sutherland opined that

the likelihood of the project actually being built is “probably pretty high” because of all the improvements that have been done on Route 29 north and south of this area.

Mr. Rochester, Chair of the Fairland Master Plan CAC, pointed out that although the Master Plan recommends construction of above-grade interchanges with Route 29 at Musgrove Road and several other streets, the recommendation comes with the caveat that as each new interchange is built, its effects on traffic patterns should be monitored to determine whether it has adverse impacts on upstream and downstream intersections or on east-west circulation, compared to the expected impacts. See Master Plan at 88-90. The Master Plan notes that monitoring “may change the priorities, the cost effectiveness of the improvements, or whether other grade-separations should be constructed at all.” *Id.* at 90. The record does not reflect whether this type of monitoring has been undertaken, or how/when SHA will decide whether to actually construct a new interchange at Musgrove Road. However, the fact that SHA has funded the design stage and begun right-of-way negotiations suggests an intent to move forward with the project.

The Applicant’s site planner, Mr. Sutherland, testified at some length about the impacts the above-grade crossing would have on Musgrove Road and the subject property. SHA plans to direct Musgrove Road over Route 29. Coming from the west on Musgrove Road, the entrances to Verizon and the subject property will not be changed, but past these entrances, the grade will increase gradually to a height of approximately 25 feet, with parapets on both sides. The grade would decrease again to the level of existing roads on the east side of Route 29. Some connections are planned between Musgrove Road and Route 29, but not in all four directions. Eastbound Musgrove Road traffic would be able to take a ramp onto southbound Route 29, and westbound Musgrove Road traffic would have an entrance onto northbound Route 29. Southbound Route 29 traffic would have an off ramp onto Musgrove Road, but northbound traffic would not.

Mr. Sutherland described significant retaining walls and grading that would be necessary to build the various ramps. As a visual aid, he superimposed elements of SHA’s current plans for the interchange on the SDP for the present case. See Ex. 37. The result shows a retaining wall running from slightly east of the site entrance up to the intersection, wrapping around the corner

and running along the east side of the subject property to a point south of its southern property line. Construction of the wall would require taking a strip of land along Route 29 from the subject property. The wall would begin at a height of one foot above the ground and rise to form a four-foot parapet that prevents cars from driving off the side of the overpass. The wall/parapet would rise gradually, with the road, to a height of 22 to 23 feet at the corner of the property, and then slope back down.

Mr. Sutherland presented a series of computer simulations depicting the visual impact of the proposed interchange on the subject property, as well as how the site would look with the ramps and retaining wall in place. See Exs. 38(a)–(f), 39(a)–(h). These simulations show, for example, that for drivers approaching the subject property eastbound on Musgrove Road, their view of the medical building would be at least partly blocked by the retaining wall. Tr. March 18 at 55. Once they are on the overpass, drivers would basically see nothing beyond the parapet on top of the retaining wall. *Id.* at 52. Drivers on southbound Route 29 would see the bridge abutments for the overpass, the parapet on top of the retaining wall along the ramp to southbound Route 29, and the top of the medical building to about the middle of the third floor windows. *Id.* at 53. From northbound Route 29, more of the building would be visible behind the retaining wall.

The Hearing Examiner forwarded Mr. Sutherland's computer simulations, and his map showing the interchange plans superimposed on the SDP, to the SHA, with a request that they comment on whether the depictions were reasonably accurate. SHA did not provide any real insight into the accuracy of Mr. Sutherland's submissions, stating only that the redlined development plan and renderings "closely represent the proximity of the development with the proposed interchange." Ex. 68. SHA requested that the all necessary dedications and/or reservation along US 29 be provided to accommodate the future interchange movements. See *id.* Mr. Sutherland's redlined SDP shows that no improvements are located within the area that would be required for right-of-way.

Mr. Sutherland also commented on the perspective of employees and patients in the medical building. He testified that from first-floor windows looking north or east, the only view would be the retaining wall. On the second floor, windows on the north side of the building and about half way down the east side of the building would see only the retaining wall. On the third floor, the

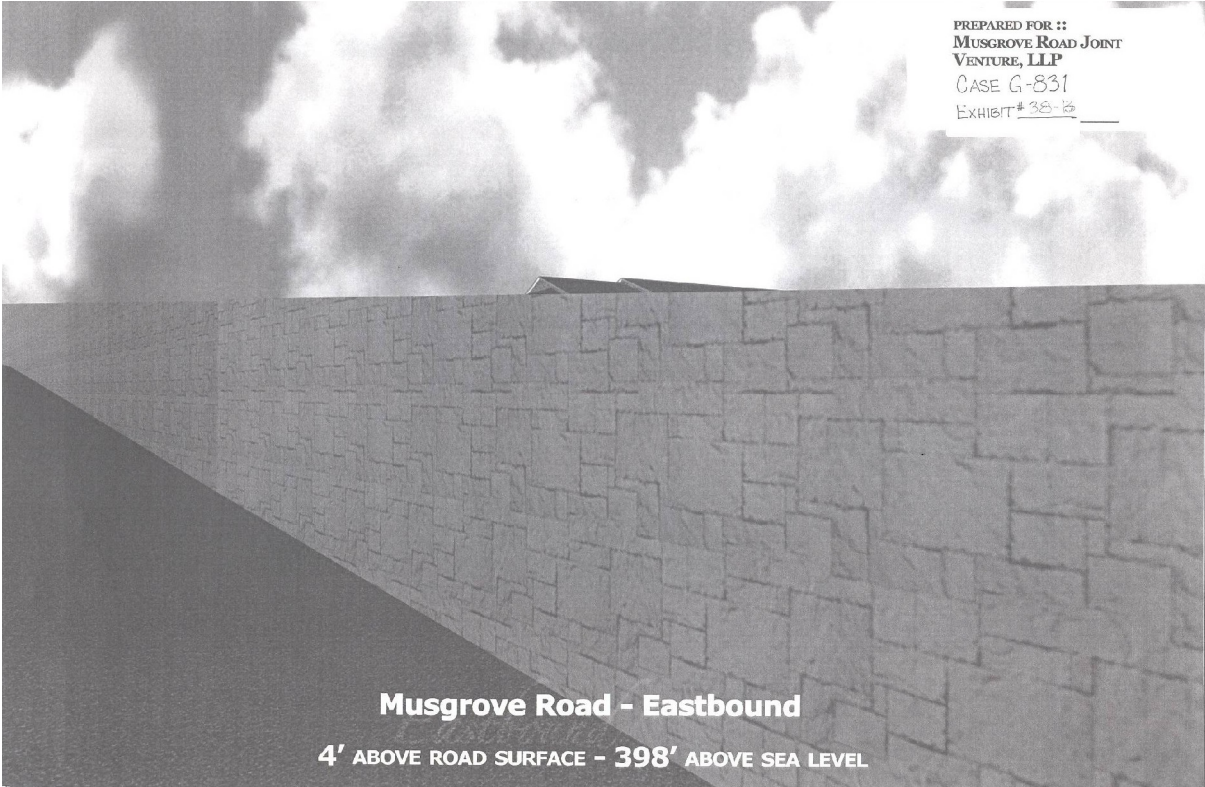
windows to the north and east (to a point about half way down the east side of the building) would be about eye level with the top of the parapet, with the tops of cars visible beyond the parapet. Because the wall would decrease in height along the east side of the building, after a point about half-way down the east side of the building only the first floor windows would have their views obscured. The east side windows in the existing building would still have a view of the small wetlands area east of the building that serves as a storm water management facility. The addition would sit much closer to the property line, with room for perhaps some hardy shrubs along the retaining wall.

Mr. Sutherland indicated that headlights probably would not shine into the building because they would be blocked by the parapet wall.

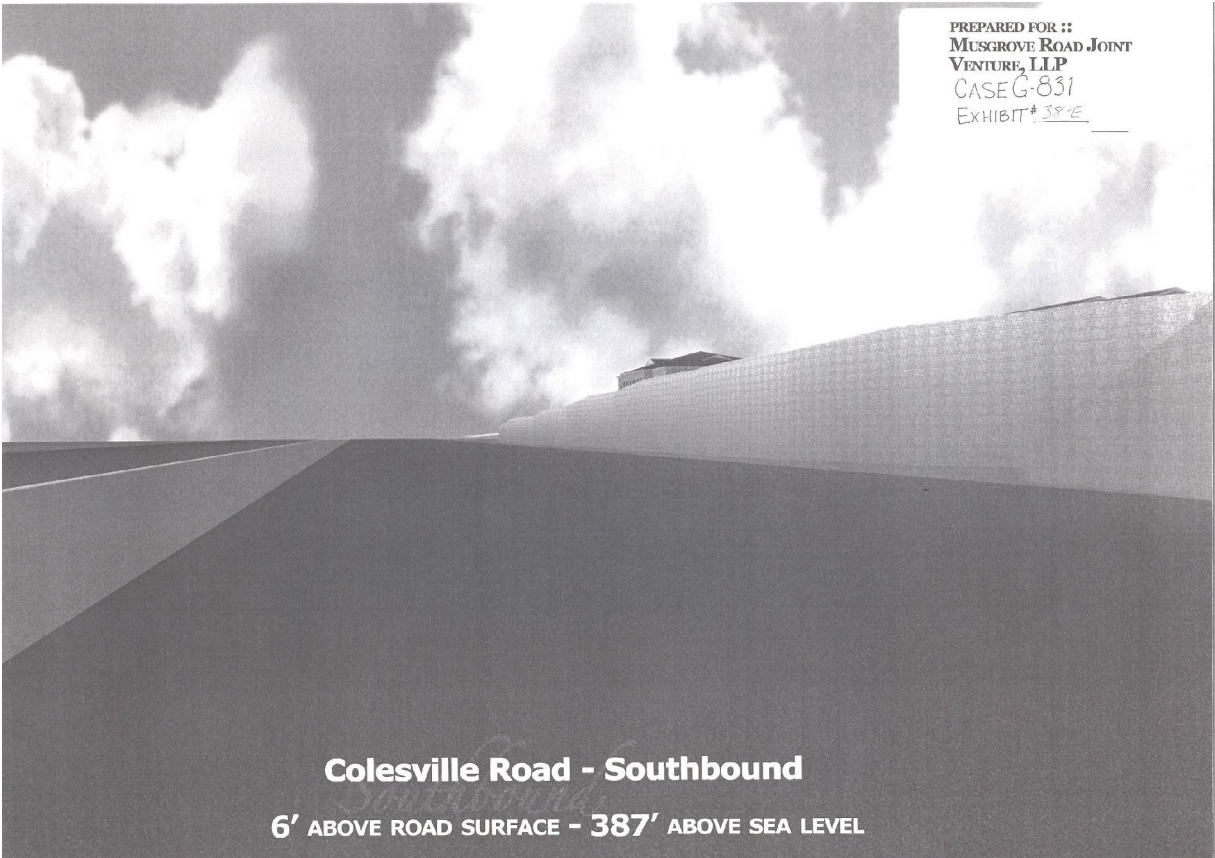
Mr. Sutherland and Mr. Perrine both opined that if the present use of the subject property were to cease, the property would not be a desirable location for residential development because it would be overshadowed by ramps and retaining walls. Moreover, any residences in that location would be subject to noise from Route 29 and from cars accelerating up the ramp on Musgrove. Ms. Weiss and Ms. Youla acknowledged that the ramps and retaining wall as shown by Mr. Sutherland would have significant impacts on the property, but they were not willing to concede that the property would be rendered no longer viable for residential use. Ms. Weiss emphasized that the Master Plan was drafted with full awareness of SHA's interchange plans, and took those plans into consideration in making its recommendations. She stated that while engineering plans were not available for the proposed Route 29 interchanges at the time of the Master Plan preparation, the drafters did have elevations, and a sense of where the retaining walls would be. Both Ms. Youla and Ms. Weiss were present for Mr. Sutherland's testimony and the presentation of his computer simulations, and both testified that this additional evidence did not change their opinion that the proposed rezoning would be inappropriate. They each noted that their opposition to the proposed rezoning is not predicated on an expectation that the subject property will revert to residential use at some future time. They expect the site and the existing building to remain in commercial use, but they feel that use should be contained rather than expanded.

A sampling of the computer simulations is provided on the pages that follow.

**Driver's View Heading East on Musgrove Road Past Subject Site. Ex. 38(g).**

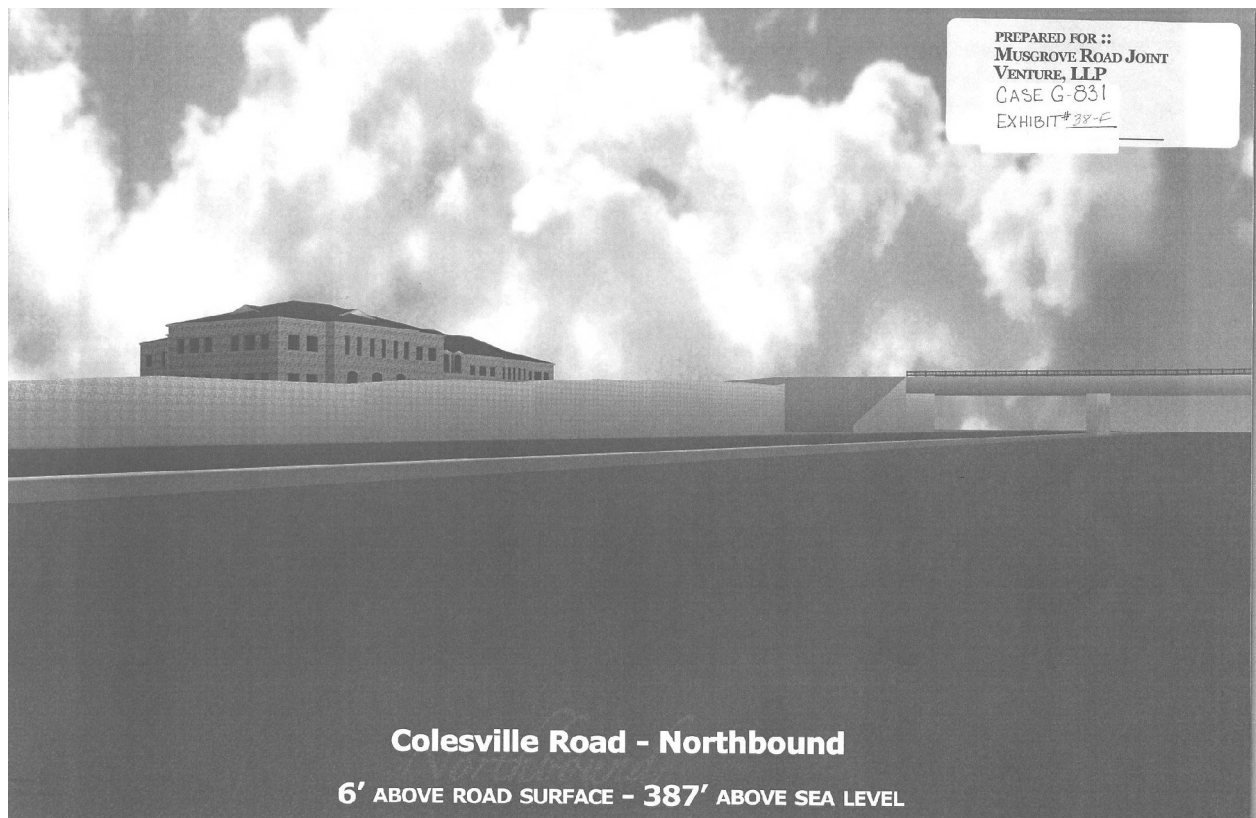


**Driver's View Heading South on Route 29 Approaching Musgrove Road. Ex. 38(e).**

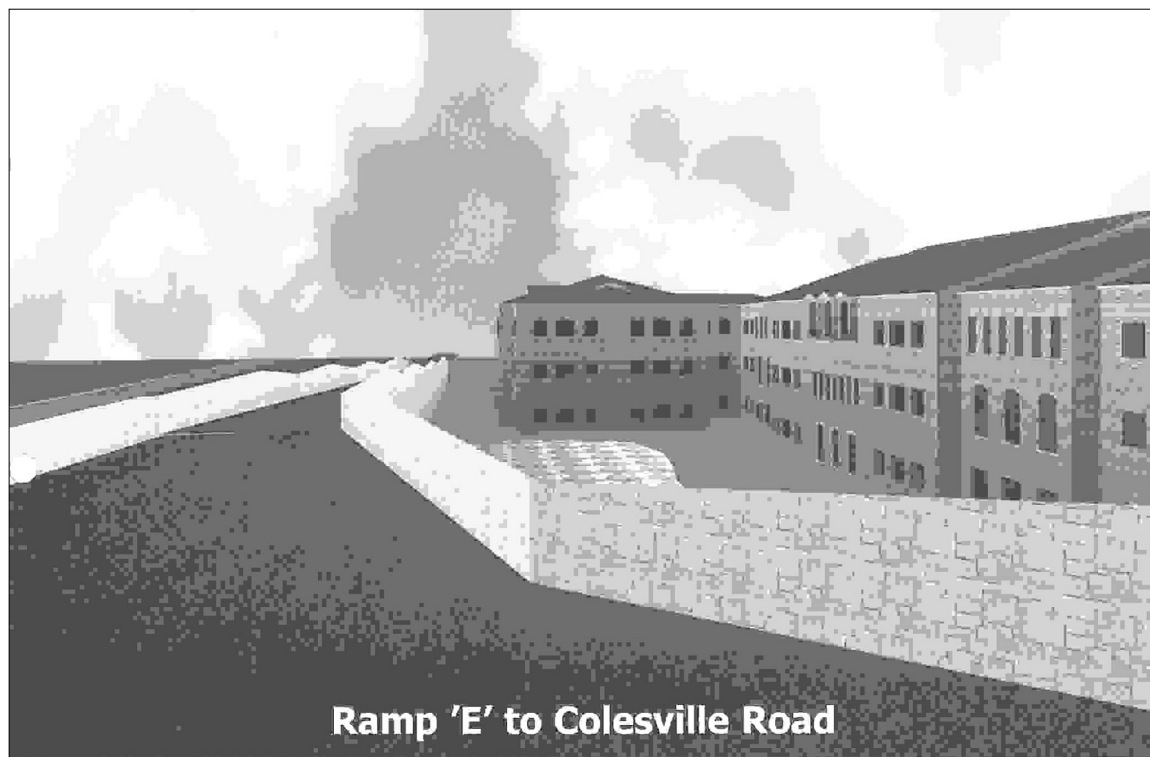




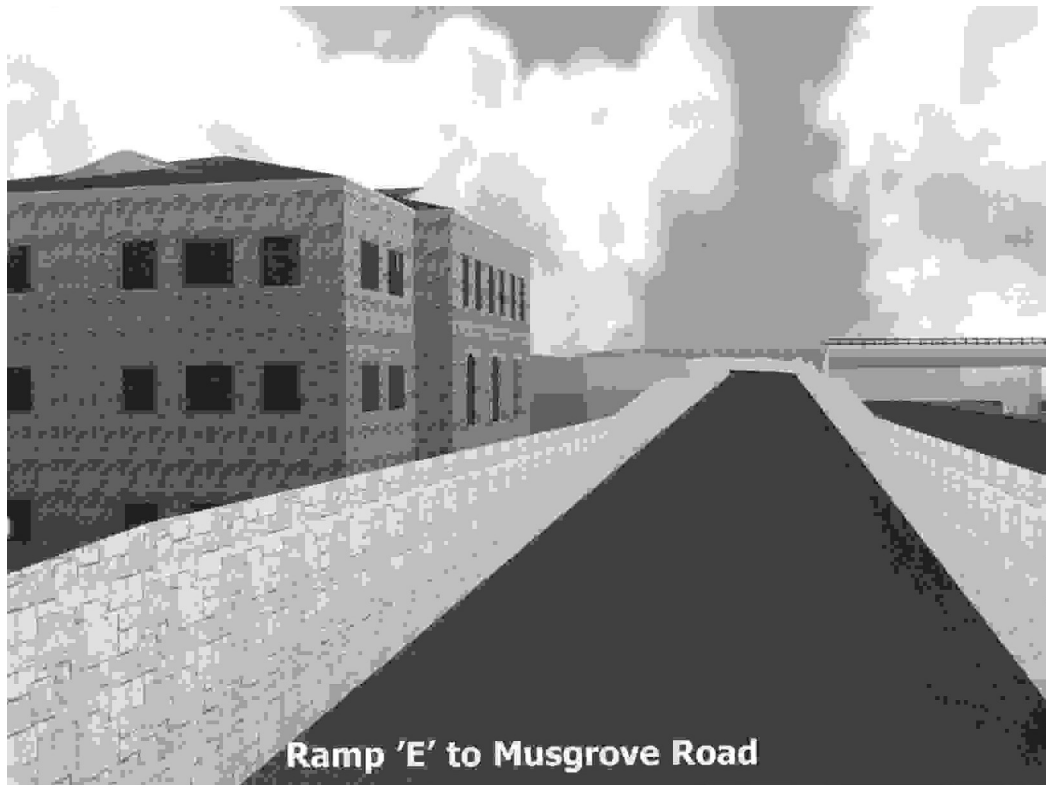
**Driver's View Heading North on Route 29 Approaching Musgrove Road. Ex. 38(f).**



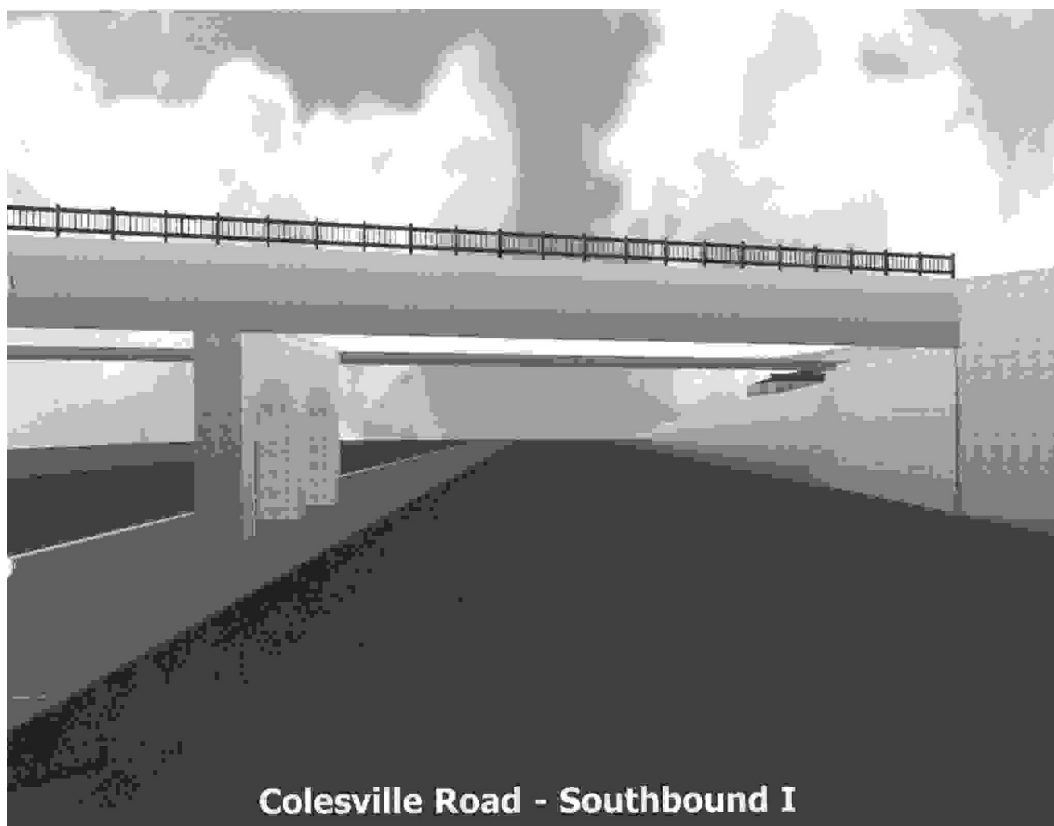
**Ramp from Musgrove Road Eastbound to Route 29 Southbound,  
with Subject Building on Right Side of Wall. Ex. 39(d).**



**Looking up Ramp from Musgrove Road Eastbound to Route 29 Southbound, against Traffic Flow. Shows Relationship of Building and Wall. Ex. 39(e).**



**Heading South on Route 29, About to Drive under Musgrove Road. Ex. 39(f).**



## **H. Public Facilities**

In evaluating the compatibility of a proposed development and whether it would serve the public interest, the District Council must consider whether the development would be adequately served by and/or would have an adverse effect on public facilities. Under the County's Adequate Public Facilities Ordinance (Code §50-35(k)), the Planning Board has the responsibility, during subdivision review, to assess the adequacy of transportation, schools, water and sewage facilities, and police, fire and health services to support the proposed development. This assessment is guided by parameters that the County Council sets each year in the Annual Growth Policy ("AGP") and biennially in the two-year AGP Policy Element.<sup>5</sup> While the final test under the APFO is carried out at subdivision, evaluation of public facilities at the zoning stage is particularly important because of the discretionary nature of this stage of the process and the opportunity for a more comprehensive review than may be available at subdivision. The District Council is charged at the zoning stage with determining whether the proposed development would have an adverse impact on public facilities and, if so, whether that impact would be mitigated by improvements reasonably probable of fruition in the foreseeable future.

### **1. Transportation: Road Capacity**

Under the 2003-05 AGP Policy Element, as of July 1, 2004 subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").<sup>6</sup> The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in the preparation of reports to the Hearing Examiner for zoning cases. LATR Guidelines at 1. LATR generally involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the peak hour of the morning and evening peak periods (6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.).

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<sup>5</sup> See 2003-05 *Annual Growth Policy – Policy Element, Resolution No. 15-375*, adopted October 28, 2003. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element.

<sup>6</sup> See 2003-05 AGP Policy Element at 6-7; *Local Area Transportation Review Guidelines Approved and Adopted July 2004* ("LATR Guidelines") at 1. The Hearing Examiner takes official notice of the LATR Guidelines.

The Applicant performed a traffic study as required in this case, taking into account existing roads, programmed roads, available or programmed mass transportation, and improvements to be provided by the Applicant, as well as existing traffic, traffic anticipated from nearby development that is approved but unbuilt (referred to as “background” traffic), and trips expected to be generated by the proposed development.

The traffic study in this case estimated that the proposed building addition would generate approximately 46 new vehicle trips in the morning peak hour and 59 trips during the evening peak hour. The traffic study assumed that the continuing use of the existing building for medical office purposes would not generate any new trips, so the only impact studied was from the additional trips that would be added by expanding the use. The small number of additional trips expected would not be enough to result in critical lane volumes above the applicable congestion level at any of the six intersections that were studied. Accordingly, Transportation Staff found that the proposed rezoning would satisfy the requirements of LATR and APF review. See Transportation Staff memorandum attached to Staff Report, Ex. 28

The Applicant’s transportation planner reached the broader conclusion that the building addition “would not adversely affect traffic operations in the vicinity of the site.” Ex. 59 at 27.

## **2. Utilities and Schools**

The subject property would continue to be served by public sewer and water and other necessary utilities with the proposed expansion of the building. See Ex. 28 at 2, 13; Ex. 17 at 5. Public school impact is not an issue in this case because no residential development is proposed.

### **I. Environment and Stormwater Management**

The subject property does not include any forest, streams, wetlands or other sensitive environmental resources. Environmental Planning Staff at the MNCPPC concluded that there are no significant environmental impacts associated with the proposed rezoning.

With regard to stormwater management, the Applicant’s site planner, Lee Sutherland, testified that the proposed addition would not increase the amount of impervious surface on Lot 5,

because it would sit on land that is currently part of the paved parking lot. Lot 5 would continue to drain to the existing stormwater management pond along the eastern property line. Mr. Sutherland explained that Lot 5 drains to the east and Lot 2 to the west. Thus, run-off from Lot 2 would not add to the amount of water flowing into the existing pond. Mr. Sutherland anticipates that Lot 2 would drain into grass swales to be created in the western portion of the site.

### **J. Community Opposition**

The record in this case contains a letter in opposition to the requested rezoning from Stuart Rochester, Chairman of the Fairland Master Plan Citizens Advisory Committee, who also testified in opposition. Mr. Rochester was deeply involved in the preparation of the Master Plan, and has continued to play an active role in its implementation.

Mr. Rochester points out that during the preparation of the 1997 Master Plan, the Applicant requested that the subject property be recommended for O-M zoning. See Ex. 29; Tr. March 18. This recommendation was unanimously rejected “for introducing yet another institutional/commercial use in a residential neighborhood surrounded by them, the cumulative effect of which was dramatically transforming the character of the community.” Ex. 29. Mr. Rochester described the subject property as crucial to retaining the residential character of the neighborhood – “one, like many in the County these days, under siege from all manner of special exceptions, rezoning applications, and creeping commercial and institutional uses.” Ex. 57. He stated that Musgrove Road functions as a gateway to the Stonecrest/Snowden’s Mill community to the west, making its compatibility with residential uses very important.

Mr. Rochester described the subject property as providing visual relief from the intensive uses on Route 29, like the extensive buffer on the Old Columbia Pike side of the Verizon facility north of Musgrove Road. When questioned during the hearing as to whether it was the subject property providing visual relief, or Lot 1 on the corner of Musgrove Road and Old Columbia Pike, Mr. Rochester stated that both serve that function, Lot 1 in its entirety and the subject site through the residential appearance of Lot 2. Tr. March 18 at 217. The following text aptly expresses the core of Mr. Rochester’s testimony:

There is nothing abstract or complicated about this. The west side of Old Columbia Pike in the area of the subject parcel is all single-family residential. The master plan discussion emphasized the importance of keeping the east side of Old Columbia – directly opposite these homes on a narrow two-lane road – residential as well or at least, whatever the uses, compatible in scale. And so a crucial point to remember is that the underlying zone throughout the area parallel to the subject site is **residential** – by design. The O-M Zone would be an anomaly here – and a fundamental departure from both the substance and intent of the master plan.

Ex. 57, emphasis in original.

Mr. Rochester noted that with one exception, all of the non-residential uses on the east side of Old Columbia Pike were there when the Master Plan was adopted, and they have been kept at a height of two stories or less to keep them from towering over neighboring houses. He stated that the only non-residential use that has been put in place since the Master Plan is the senior housing facility south of the subject property, which, as noted elsewhere in this report, the community supported based on plans that were not, in the end, reflected in the actual construction. Moreover, the senior housing facility is at least residential, although multi-family in nature.

Mr. Rochester emphasized that the CAC believes this neighborhood has reached a tipping point. The CAC found the proposal for O-M zoning on the subject site inappropriate at the time of the Master Plan, and with the passage of time and intrusion of “other threats to the sense of place on Old Columbia Pike from the ICC and road work on [Route] 29, this site has acquired all the more significance as a highly visible transitional parcel. . . “ where residential compatibility is paramount. Ex. 57.

#### **IV. SUMMARY OF TESTIMONY**

##### **A. Applicant’s Case in Chief**

1. M. Lee Sutherland, site planner. Tr. March 18 at 13-82.

Mr. Sutherland was designated an expert in site design/site planning. He prepared the SDP and color rendering. He first described the site, which has 3.53 acres of land and consists of two recorded, subdivided lots, Lots 2 and 5 of Thompson’s Addition to Deer Park. Mr. Sutherland stated that the existing structure and parking are located on Lot 5, which measures 120,000+ square feet.

Lot 2 contains a vacant house, as well as the ingress/egress driveway for the medical building and its parking lot. The existing medical building is a three-story, brick building with about 38,000 square feet of floor area, a little less than 33 feet in height.

Mr. Sutherland stated that the proposed addition to the medical building would match the color, materials and architectural design of the existing structure. To link the proposed addition with the existing building, the south end of the existing building would be modified, extending its corridors so that the floors would connect at the same level from the existing building to the addition. The addition would be three stories high, with a footprint of less than 5,000 square feet and a total of approximately 14,000 square feet of floor area. The FAR would increase from 0.31 to 0.34. The addition would be placed south of the existing building, on part of the existing parking lot. The house on Lot 2 would be demolished, and that lot would be used for additional surface parking, allowing the use to satisfy applicable parking regulations with 267 parking spaces. Tr. March 18 at 24, 28.

Mr. Sutherland testified that the property is currently operating as a medical office, pursuant to a special exception granted in 1984. He explained that because of a 1989 change in the zoning law, the special exception is a grandfathered nonconforming use, and cannot be modified to allow expansion of the operation.

Mr. Sutherland noted that the site currently has a storm water management facility on the east side of Lot 5, between the existing building and U.S. Route 29. It was originally designed as a sand filter and later converted to a wetlands facility. The proposed additional would not change the impervious area on Lot 5, so no changes are proposed to the existing storm water management facility. A watershed line runs basically between Lot 5 and Lot 2, so the Lot 5 facility would not be affected by additional run-off from new impervious are on Lot 2. A series of grass swales would be designed to handle that run-off consistent with county standards.

Mr. Sutherland stated that the combined building would satisfy all of the development standards in the O-M Zone, including building height, building coverage, green area and setbacks. Tr. March 18 at 29-30, 36-37. He noted that the site is served by water and sewer connections in

Musgrove Road, and the connections would extend from the new building to the addition. He noted that based on WSSC estimates, there are no water or sewer deficiencies in the area.

With regard to compatibility with the surrounding area, Mr. Sutherland noted that the building height would not change, and there are already several large buildings in the surrounding area – the Verizon site to the north, a large building caddy corner across Route 29, and a church to the west. Mr. Sutherland opined that “if the existing building is considered to be compatible then the addition will still be compatible.” Tr. March 18 at 40.

Turning to traffic circulation issues, Mr. Sutherland stated that Lot 5, on which the medical building sits, has no direct vehicular access to any street. Tr. March 18 at 66. When the special exception was originally approved, it was required to go through subdivision. During the subdivision process, the Planning Board required the owner of the property to locate the access point for Lot 5 on the adjacent Lot 2 directly opposite the entrance to the Verizon site. *Id.* at 67. With the entrances opposite one another, there is just one cross driveway between Route 29 and Old Columbia Pike. *Id.* at 40-41. Mr. Sutherland noted that Lot 2 was not part of the special exception. He also observed that under a judicial decision he referred to as the *Brinklow* decision, a commercial use must have its supporting facilities, such as ingress/egress, contained within the commercial property, and may not have them on facing residential property. *Id.* at 67-68.

Mr. Sutherland testified that there would not be any “radical change” in the lighting for the property, and the lighting would not invade the surrounding roadways or residential properties. Tr. March 18 at 41. Under questioning by the People’s Counsel, he specified that the existing light poles are 16 feet high, and the same ones would be extended to the new parking area. All the fixtures are shielded, directed down. Mr. Sutherland noted that the Applicant plans to install perimeter evergreen plantings, as well as a 20-foot grass swale between the new parking area and the property line. The closest lights to the adjacent residential property would be about 70 feet from the property line and screened by the proposed landscaping. Mr. Sutherland opined that the lighting would not produce adverse lighting or glare effects on the adjacent residential lot to the west, or on the adjacent property to the south, which is classified under a residential zone. He did not know whether the



current activity in the medical building extends into the evening hours, or whether the lights are on timers.

Mr. Sutherland addressed at some length SHA's plans to construct an above-grade interchange at the intersection of Route 29 and Musgrove Road. He explained that SHA is planning to eliminate some of the crossings on the stretch of Route 29 between Fairland Road (north of the subject site) and Randolph Road (south of the subject site). SHA plans to direct Musgrove Road over Route 29. Coming from the west on Musgrove Road, the entrances to Verizon and the subject property will not be changed, but after that, the grade will start to increase to a height of approximately 25 feet, with parapets on the sides. The grade would decrease again to the level of existing roads on the east side of Route 29. Some connections are planned between Musgrove Road and Route 29, but not in all four directions. Eastbound Musgrove Road traffic would be able to take a ramp onto southbound Route 29, and westbound Musgrove Road traffic would have a ramp entrance onto northbound Route 29. Southbound Route 29 traffic would have an off ramp onto Musgrove Road, but northbound traffic would not.

Mr. Sutherland described significant retaining walls and grading that will be necessary to build the various ramps involved in the proposed interchange construction. To provide a visual aid, he superimposed elements of SHA's current plans for the interchange on the SDP for the present case. See Ex. 37. This exhibit shows a retaining wall running from a little bit east of the site entrance up to the intersection, wrapping around the corner and running along the east side of the subject property to a point south of its southern property line. Construction of the wall would require taking a strip of land along Route 29 from the subject property. The wall would begin at a height of one foot above the ground and rise to form a four-foot parapet that prevents cars from driving off the side of the overpass. The wall/parapet would rise gradually, with the road, to a height of 22 to 23 feet at the corner of the property, then slope back down.

Mr. Sutherland testified that the proposed interchange project is currently funded for the engineering stage, and that SHA is in the process of property acquisition negotiations. [Mr. Abrams interjected that SHA has begun property acquisition negotiations with the owner of the subject

property.] Mr. Sutherland opined that the likelihood of the project actually being built is “probably pretty high” because of all the improvements that have been done on Route 29 north and south of this area. He did not have any insight into the likely timing.

Mr. Sutherland presented a series of computer simulations that are designed to depict the visual impact of the proposed interchange project on the subject property, and also commented on how the views available to employees and patients in the medical building would become restricted.

Mr. Sutherland opined that if the present use of the subject property were to cease, the property would not be a desirable location for residential development because it would be overshadowed by ramps and retaining walls. Moreover, any residences in that location would be subject to noise from Route 29 and from cars accelerating up the ramp on Musgrove.

Under questioning by Mr. Rochester of the Fairland Master Plan CAC, Mr. Sutherland agreed that the subject building is the only office building in its block, which is populated by a house, a Sikh Temple and associated vacant land, a church and a senior housing facility. He stated that the Sikh Temple, just south of the subject property, is in a one-story residential structure. With regard to the likelihood that the interchange improvements proposed for the intersection of Route 29 and Musgrove Road would be built, he conceded that he was not aware of a provision in the Master Plan stating that such improvements will depend on monitoring traffic flows after the major grade separations have been done at Route 198, Briggs Chaney Road and Randolph Road. Tr. March 18 at 79. Mr. Sutherland opined that with the planned buffer and landscaping, the proposed rezoning would not have any adverse effect on the adjacent residential use “beyond what’s there right now.” *Id.* at 80.

2. Phil Perrine, land planner. Tr. March 18 at 82-155; March 28 at 112-128.

Mr. Perrine was designated an expert in land use planning. He first described the history of the subject property, stating that it was approved for a medical clinic and medical offices in 1984, to be located in a 3-story building on what is now Lot 5. The building was approved for 38,000 square feet and 192 parking spaces, and was to have medical offices, emergency care, a pharmacy and lab facilities. A subdivision plat combining the original Lots 3 and 4 into Lot 5 was approved in

1985, and the building was then constructed. Mr. Perrine confirmed that the subdivision approval required access to be provided on the adjacent Lot 2. Tr. March 18 at 119-121.

Mr. Perrine observed that in approving the original special exception, the Board of Appeals was obligated to make a finding that the use was compatible with and would not adversely affect adjacent properties. Tr. March 18 at 84. He noted that in 1989, a zoning text amendment restricted medical clinic special exceptions to a maximum of four doctors. The amendment specified that existing medical clinic special exceptions were not to be considered valid non-conforming uses. As a result, the subject building cannot expand as a special exception. The only way the building can be expanded is under commercial zoning.

Mr. Perrine testified that the proposed rezoning would not involve a change in use. The property would continue to be used for medical offices, as a binding element of the SDP. He acknowledged that the use as described in the original special exception proceedings was to include emergency care, lab facilities and a pharmacy, in addition to medical offices, but the only use currently in the building is medical offices. *Id.* at 87-88. Mr. Perrine was not aware of whether any of the other uses were every implemented.

Mr. Perrine proceeded to describe the location of the subject property, the character of surrounding land uses, and his approach to identifying the “surrounding area” for purposes of this analysis. He stated that the surrounding area for a floating zone case has to “capture those uses that have a significant relationship to the subject property. There could be an impact on them from the property or they are affecting the subject property.” *Id.* at 92. Mr. Perrine included in his recommended surrounding area “those uses that I thought that relationship was significant.” He equated the concept of the surrounding area to the “area” referred to in the final phrase of the O-M Zone purpose clause. [Note: the final sentence of the purpose clause reads: “This zone is not intended for use in areas which are predominantly one-family residential in character.”]

Mr. Perrine further explained that to determine the appropriate surrounding area, one has to understand the size, scale and height of the building, how far away it can be seen, the nature of the activity on the site and related traffic, and the time of day the use would operate. He stated that

the immediately adjacent uses obviously have a relationship with the site. He acknowledged that he defined the surrounding area as including both of the Verizon properties, but there isn't much of a relationship between the north ends of those properties and the subject property. Tr. March 18 at 93-94. Nonetheless, he normally goes to roads or natural features to draw a line.

Mr. Perrine pointed to the zoning map from the Master Plan, which defined the general area in terms of roads. Route 29 runs through the middle of the map, and cross-streets are indicated including Fairland, Randolph and Musgrove Roads. Mr. Perrine reviewed two past zoning decision in which requests for reclassification to the O-M Zone were granted, one in the mid-1980s and one in '99'. He reported that LMA No. G-678 addressed the Verizon property that lies diagonally across Route 29 from the subject site, and LMA G-406 involved the Seventh Day Adventist property located south of Randolph Road, between Route 29 and Old Columbia Pike. Both of those cases involved larger land areas and larger buildings than the present case. However, Mr. Perrine finds the surrounding area descriptions instructive.

The surrounding area established in G-678 (approved in 1991) extended across Route 29 to Old Columbia Pike on the west, midway through the residential zoning on the east, north to the southern boundary of the proposed Intercounty Connector, and south to Randolph Road. Mr. Perrine noted that it went from road to road, Route 29 to Old Columbia Pike, and extended to roads or other significant boundaries in the other directions. In G-406 (approved in 1986), the subject property itself extended from Route 29 to Old Columbia Pike, and the surrounding area reached from east of Route 29 to west of Old Columbia Pike.

Mr. Perrine explained that his description of the surrounding area stops at Old Columbia Pike because "I don't think there's a significant relationship with the uses east of –west of Old Columbia Pike to the subject property." Tr. March 18 at 97. He based that largely on sight and sound, and whether there would be a traffic impact. He noted that the existing building is quite removed from Old Columbia Pike, about 400 feet away, and an existing residence and Sikh Temple lie between the building and Old Columbia Pike. Moreover, the access point is on Musgrove Road, and the evidence suggests no negative traffic impact. With regard to the proposed expanded parking

area, Mr. Perrine noted that the point of access would not change, and the new parking would be screened with trees. The minimum side setback that would be required for the special exception is 16 feet, and the Applicant is proposing a 20-foot setback along the boundary with the adjacent residence. Given the distance between Old Columbia Pike and the proposed parking area, plus the planned perimeter trees, Mr. Perrine thinks there would be no impact on the west side of Old Columbia Pike. He noted that some of the new parking might be visible to someone driving on Musgrove Road, but he does not consider that a significant enough relationship to include the area west of Old Columbia Pike in the surrounding area.

Mr. Perrine testified that he included uses east of Route 29 in his surrounding area, despite the fact that the roadway is a very large highway, because they are confronting uses, and at this point there is no wall between them. He noted that the approved special exceptions across Route 29 from the subject property (assisted living and nursing home) included a description of properties west of Route 29 in their surrounding area discussions. He acknowledged that the immediately adjacent uses have a more significant relationship with the subject property than the uses on the east side of Route 29.

Mr. Perrine described in some detail the senior housing living facility that was built recently, south of the subject property. He noted that it is a two-story building, shaped like a long "E," and operates as a special exception with 80 independent-living apartments for seniors. The long side of the building measures approximately 450 feet long by 60 feet wide, the middle leg of the E is 70 feet long and the other two legs are each about 100 feet long. Tr. March 18 at 121-122. The building has only two full stories, but the lower level is partially out of grade, making it a two-and-half story building, plus associated parking. The facility has a footprint of just under 46,000 square feet, so the total square footage with two full stories would be about 92,000 square feet. Mr. Perrine concluded that it is comparable in bulk to the building on the subject property, and noted that it is located on residentially zoned land, in the R-90 Zone.

Comparing the building proposed here with the Verizon facility immediately to the north, Mr. Perrine stated that the Verizon building is much larger, with seven stories for part of its

length, stepping down to three stories along Route 29. The Verizon building and its extensive parking lots occupy the entire block between Musgrove Road on the south, Old Columbia Pike to the west, Fairland Road to the north and Route 29 to the east. West of the Verizon facility, across Old Columbia Pike, is part of the Stonecrest/Snowden's Mill community of single-family detached homes. The Verizon facility is heavily screened by a berm and landscaping, so neither the building nor the parking lot is readily visible from homes fronting on Old Columbia Pike. The building becomes visible above the screening farther away from Old Columbia Pike, as the angle of vision changes. The only view of the parking lot is a glimpse through the entrance on Musgrove Road. Mr. Perrine added that the Verizon building is fully visible from Route 29.

Mr. Perrine noted that both the building and the parking for the Verizon facility are much larger than what is proposed for the subject site. Moreover, the existing building on the subject site and the proposed addition are much farther from Old Columbia Pike than the Verizon facility, and much lower in height.

Mr. Perrine indicated that the building on the subject site is not visible from homes west of Old Columbia Pike, except right at the intersection of Old Columbia Pike and Musgrove Road. The building is visible at that point through some trees along the parking lot, and the proposed addition would be partly visible. The building is also largely screened from view to the south by the Sikh Temple and adjacent wooded area. Mr. Perrine stated that the expanded parking area likely would be screened from view, for drivers coming up Old Columbia Pike from the south, by the temple building and trees. He noted that the building on the subject property is fully visible from Route 29.

Mr. Perrine noted that if the requested rezoning is approved, the project will have to proceed through site plan review, which will involve a review of compatibility with regard to lighting and landscaping. He stated (and Ms. Youla confirmed) that in cases such as this, Technical Staff apply a standard of no more than 0.1 footcandles of light at the property line, which is the lighting standard imposed on special exceptions that border residential uses. Tr. March 18 at 106.

With regard to assessing the character of a neighborhood, Mr. Perrine opined that the primary factor is existing land use, especially in an area that is fully developed, and master plan

recommendations are a secondary indicator. He added that master plan recommendations play a larger role if there is a great deal of vacant land around the property, or if the area is undergoing redevelopment, with changes in use based on a master plan. If the area is basically developed and stable, the existing land use defines its character. Tr. March 18 at 107.

Mr. Perrine opined that the surrounding area in this case is a mixed use area, with office, commercial and institutional uses, one residence and some vacant land that the master plan recommends for residential use. He based this conclusion on the presence of the Verizon office building, the Sikh Temple, the residence adjacent to the subject site to the west, the vacant land to the south, the senior living facility, the church, and the C-1 commercial uses further south. He noted that across Route 29 are found assisted living and nursing home facilities, as well as single-family homes. Mr. Perrine stated that the C-1 commercial zone provides for local neighborhood commercial uses. He noted that if the vacant area between Old Columbia Pike and Route 29 were developed for residential uses, those residents would be served by the local commercial uses at the junction of Old Columbia Pike and Randolph Road, as would employees and patients at the subject site. Mr. Perrine opined that it would be appropriate to include that commercial area along Randolph Road in the surrounding area for purposes of this analysis, using Randolph Road as a more logical stopping point. *Id.* at 109.

Mr. Perrine acknowledged that the area west of Old Columbia Road is a single-family detached residential community. Within the 27-acre surrounding area defined by Technical Staff, however, Mr. Perrine observed that there is only one existing residence outside the subject property (which, of course, currently includes a vacant single-family residence). Tr. March 18 at 110, 122. Mr. Perrine provided a written breakdown of uses in that 27-acre area, prepared by Mr. Sutherland, which indicates that the single-family residence adjacent to the subject property to the west represents about three percent of the acreage, the church and the temple together occupy about 26 percent of the land area, the senior housing project occupies 16 percent, the subject property about 13 percent and vacant land about 42 percent. *Id.* at 123. Even if the vacant land were considered single-family residential in nature, that would divide the 27 acres into 44 percent single-family and 56 percent other

uses. Mr. Perrine testified that substantially all of the vacant property south of the subject site is owned by the organization that operates the Sikh Temple. Currently, part of that vacant area is used for overflow parking. Mr. Perrine concluded that Staff's surrounding area is not predominantly single-family residential in character. He also noted that the C-1 commercial area along Randolph Road, which he believes should be considered part of the surrounding area, measures approximately six acres, all in non-residential use.

Mr. Perrine noted that a variety of uses other than single-family residences have developed east of Old Columbia Pike and along Route 29, while the area west of Old Columbia Pike has remained, by and large, residential. He described the "corridor" between Old Columbia Pike and Route 29 as a mixed-use area, with commercial, institutional and office uses. *Id.* at 111.

Turning to the Master Plan for guidance on how to define the relevant surrounding area, Mr. Perrine stated that the subject property is not part of any of the communities that are identified in the Master Plan. *Id.* at 112. Reviewing a map from the Master Plan, he noted that the Stonecrest/Snowden's Mill community is shown running west from Old Columbia Pike – not from Route 29, as is the case with several other communities identified in the Master Plan. *Id.* at 111-115.

Mr. Perrine explained that he did not include the Stonecrest/Snowden's Mill community is the surrounding area for this case because that community extends out to about 4,000 feet from the subject site, which is too far. In addition, Old Columbia Pike has been a divide for development historically, and was used as a divide at this location in the Master Plan. In addition, the past rezoning actions that reclassified the Verizon facility east of Route 29, and the Adventist headquarters property south of Randolph Road, to the O-M Zone used surrounding areas that ended at Old Columbia Pike. Mr. Perrine identified the Master Plan communities in which both of those properties are located, and noted that both contained areas of single-family detached dwellings at the time of their rezonings. *Id.* at 116-118.

With regard to the proposed interchange improvements at Musgrove Road and Route 29, Mr. Perrine opined that the ramps and retaining walls would have a considerable impact on the subject property. *Id.* at 126. The north end of the property would be exposed to the noise and fumes



of cars accelerating up the ramp onto the overpass, and the northeast corner of the property would experience a “canyon” effect from the 25-foot-high retaining wall wrapping around it. Mr. Perrine noted that the wall would not serve as a noise barrier, because traffic would travel near the top of it, on the overpass, not at ground level on the other side of the wall. He stated that these road improvements would also likely have lighting, which would be located near the top of the retaining wall. Mr. Perrine concluded that this site would not be an appropriate place for housing. *Id.* at 128.

In reviewing impacts on adjacent uses, Mr. Perrine opined that the proposed addition on the subject site would have no impact on the property’s relationship with the Verizon site or the Sikh Temple property. He noted that the open, grassy part of the Sikh property would be 20 feet from the proposed building addition, but is used only for overflow parking. Moreover, the wooded vacant area further south is about 200 feet from the proposed addition, and would not be affected. Mr. Perrine noted, in addition, that the Master Plan calls for developing housing on that property that would be buffered from Route 29 and oriented towards Old Columbia Pike, creating distance between any such homes and the proposed addition.

Mr. Perrine stated that the adjacent residence would be buffered by a 20-foot setback and landscaping. He also noted that the existing house on that property is oriented towards the intersection of Musgrove Road and Old Columbia Pike, so that a corner of the building, not the side yard or the rear yard, is located adjacent to the subject property. Mr. Perrine also stated that there is nothing inherently incompatible in locating a surface parking area and access point adjacent to a single-family residential use. He noted that in areas such as the Bethesda CBD, surface parking and even structured parking have been located next to residences. *Id.* at 130-131.

Moving across Old Columbia Pike, Mr. Perrine opined that the proposed development would be compatible with the Stonecrest/Snowden’s Mill community, which would have very little additional impact. He noted that only about three percent of site traffic currently uses Old Columbia Pike, and that is expected to rise only to about four percent with the proposed addition. *Id.* at 133.

Mr. Perrine then outlined the elements of the purpose clause for the O-M Zone and opined that the present application satisfies it. Tr. March 18 at 133-34.

Turning to Master Plan recommendations for the subject property, Mr. Perrine referred to the Master Plan's land use plan for the Fairland area. He noted that the plan identifies at least the Lot 5 portion of the subject property as the site of a medical office/clinic, and shows the property in commercial use. [This contrasts with the Master Plan's recommendations regarding encouraging single-family detached housing in the Fairland area.] Mr. Perrine opined that in light of the different indications for the property in the text and on the land use plan, he views the commercial land use recommendation on the land use plan as more appropriate. He noted that the existing use is relatively new, only 20 years old, and is useful both to the community and to the owner so there is no reason to change it. *Id.* at 136. He also noted that the Master Plan recommends continued office and institutional uses along Route 29. Mr. Perrine observed that there is a variety of non-residential uses along both sides of Route 29, with some areas of single-family residential development, but it is largely a mixed-use corridor up to Briggs Chaney Road. Mr. Perrine opined that the present application would conform to the basic mixed-use character of the Route 29 corridor that is depicted in the Master Plan.

Mr. Perrine testified that one of the Master Plan's goals was to provide for more single-family detached housing, to balance the percentage mix of townhouses and multi-family residential uses. To carry this out, the Master Plan called for a series of down-zonings to permit fewer units and move toward zones that were more oriented towards single-family detached development. Mr. Perrine noted that the large vacant area just south of the Sikh Temple was down-zoned from the R-90 Zone to the R-200 Zone as a result of the Master Plan. Given that the property measures about 11 acres, that change resulted in permitting 22 homes under the R-200 Zone, rather than 39 under R-90. *Id.* at 139. Mr. Perrine suggested that this outcome was inconsistent with the Master Plan's intent to encourage *more* housing, although it did promote single-family detached dwellings as a use type. He acknowledged that townhouses may be built in both the R-90 and the R-200 Zones where MPDUs are included, although a lower percentage of townhouses is permitted under R-200 zoning. Mr. Perrine suggested that rather than down-zoning the property, the Master Plan could have, instead, limited the number of townhouses in an R-90 cluster to control the number of townhouses. *Id.* at 140-41.

In conclusion, Mr. Perrine opined that the present application is in conformance with the Master Plan vision for the subject property and compatible with existing and planned land uses in the immediate surrounding community. He noted that the building height is slightly below the maximum height permitted in the R-90 Zone and significantly lower than the maximum height in the R-200 Zone; the Verizon building to the north is much taller; the Verizon building on the east side of Route 29 is only two stories but is classified under the O-M Zone, which permits five to seven stories; the existing building is closer to Route 29 than to any other uses; the building would be visually buffered, allowing only a filtered view at one spot – the intersection of Old Columbia Pike and Musgrove Road; and the small amount of additional traffic would have no negative impact. Mr. Perrine also noted the limitations to which the Applicant has bound itself on the SDP, including building height, FAR and lot coverage.

In response to the Planning Board's and Technical Staff's concern that an affirmative decision in the present case would increase the likelihood of an application for commercial zoning on the adjacent Lot 1, Mr. Perrine stated that such an application would turn on compatibility, and would not be able to rely on another O-M zoning approval. He emphasized that such an application would require its own grounds to support rezoning, based on its setting and adjoining uses. Tr. March 18 at 153-54. Mr. Perrine stated that in his experience, there is a sense of past practice with regard to rezonings, but each case stands on its own.

Mr. Perrine noted that the subject property is served by adequate public services, and he was aware of no capacity or availability problems. Mr. Perrine testified, moreover, that the proposed use would serve the public interest by providing medical services to an area stretching from White Oak to Burtonsville, as well as for residents of the immediate area, including nearby senior housing and nursing home residents. *Id.* at 146-47. He opined that it is in the public interest to provide for a variety of medical specialties, so that medical needs can be met within a single facility. He acknowledged, however, that the Master Plan did not specifically discuss medical needs.

Mr. Perrine testified that the population in the Fairland area nearly tripled from 1970 to 1997, increasing from approximately 9,700 people to about 36,000. He referred to a table in the

Master Plan that breaks down the recommended zoning categories for the entire 8,265 acres in the planning area. See Master Plan at 23. That table shows that only about three percent of the entire acreage was recommended for commercial zoning categories that permit professional medical offices. *Id.* at 149. Moreover, the Master Plan notes that employment growth would “probably be generated primarily from developed properties that have not reached maximum potential.” *Id.* at 150. Mr. Perrine noted that only one large parcel of land had the potential to create a substantial number of new jobs, and it was recommended for industrial zoning classifications that would not permit a medical office use. He stated that the subject property, on the other hand, falls within the Master Plan’s description of development properties that have not reach maximum potential.

Mr. Perrine observed that the sectional map amendment that implemented the Master Plan reclassified 752 acres of land, with a net increase of only five acres in the amount of land that could typically support medical offices. *Id.* at 152-53.

Under cross-examination by a community member (Stuart Rochester, Chairman of the Fairland Master Plan Citizens Advisory Committee), Mr. Perrine agreed that a non-residential use could have an impact on nearby residences, particularly if it is of a different height or scale. He conceded that the far northeast corner of the surrounding area that he recommended is about 2,100 feet from the subject property, while the southwest corner of Musgrove Road and Old Columbia Pike is much closer, about 230 feet from the property line. *Id.* at 187. He explained that he included that area because it is part of the Verizon site east of Route 29, which is opposite the subject property. Mr. Perrine stated that he did not include the neighborhood west of Old Columbia Pike in the surrounding area because he felt that the proposed addition would be barely visible from those properties.

Under further cross-examination, Mr. Perrine testified that he believes the proposed O-M zoning would have no impact on the properties to the west. He acknowledged that Route 29 is a more significant road in the area than Old Columbia Pike. However, he observed that while there are similar use on both sides of Route 29, the land uses on either side of Old Columbia Pike are quite different, which is why he referred to it as a major corridor.

Mr. Perrine acknowledged that the two past O-M zoning cases that he referred to, the Verizon case in 1991 and the Adventist headquarters case in 1986, were decided under a previous Master Plan. *Id.* at 191. He also acknowledged that a high priority of the 1997 Master Plan was to encourage more single-family detached housing, which was a significant change from the previous plan. He maintained, however, that whether the subject property is zoned O-M, or is zoned R-90 with a special exception on it, the impact on the neighborhood is the same, as the character of the area is defined primarily by existing land uses. *Id.* at 193-94. Mr. Perrine emphasized that while the owners of the corner property might argue that the present case, if successful, justifies rezoning their property as well, they would still have to demonstrate compatibility, and the present rezoning would not be a basis for change.

In response to questioning by the People's Counsel, Mr. Perrine agreed that the purpose clause for the O-M Zone refers to areas where high intensity *uses* are not appropriate, not areas where high intensity *zoning* is not appropriate. Tr. March 28 at 109. He confirmed that he believes the reference in the purpose clause to "adjoining neighborhood" refers to or includes, in this case, the Stonecrest/Snowden's Mill community. The word "area" refers to the area where the O-M Zone is being proposed. Mr. Perrine stated that the zone is intended for areas where high-intensity uses are not appropriate, but moderate intensity office buildings will not have an adverse impact on, not the area, but the adjoining neighborhood. He explained that there are two concepts: an area where high intensity uses may not be appropriate, and an adjoining neighborhood that could be adversely impacted by moderate intensity office buildings. *Id.* at 110-111. Addressing the final sentence of the purpose clause, Mr. Perrine noted that the language again references the "area" in which the O-M Zone is proposed, stating that the zone should not be used in an area that is predominantly single-family residential in character. Thus, the O-M Zone fits in an area that is not appropriate for high-density uses, but is not predominantly single-family residential in character. *Id.* at 112-112. Mr. Perrine added that in his view, "appropriate" in this context means something that is compatible.

Mr. Perrine further testified about the meaning of the standard used in zoning cases that a proposed development must be “compatible with surrounding land uses.” *Id.* at 112. He stated that analyzing compatibility requires understanding the character of the surrounding area and assessing what effect the proposed use would have on it, as well as what effect the surrounding area has on the character of the subject property and its potential use. Mr. Perrine concludes that the surrounding area considered for compatibility purposes is the same, or virtually the same, as the “area” referred to in the purpose clause.

2. Lee Cunningham, transportation and land planner. Tr. March 18 at 222-233.

Mr. Cunningham was designated an expert in transportation planning and land planning. He described the road network in the area of the subject property and confirmed that he believes the improvements SHA plans for the intersection of Musgrove Road and Route 29 are as described earlier by Mr. Sutherland. Tr. March 18 at 224. Mr. Cunningham stated that these improvements would involve taking property from the subject site for construction, plus erecting retaining walls along the remaining frontage. He stated that the visual impact would be to place the existing building “in a very constrained area that is bounded by relatively high retaining walls on two sides.” *Id.*

Mr. Cunningham testified that the access point for the subject property is about 500 feet from the Route 29 intersection, with adequate sight distance to accommodate traffic at the posted speed limit.

Mr. Cunningham performed a standard adequate facilities test to assess the traffic impact of the proposed rezoning. This included traffic counts at six intersections identified by Technical Staff, along Old Columbia Pike and Route 29. The only nearby interchange that was not studied was at Randolph Road and Route 29, which was under construction at the time and is planned as a high-capacity interchange that would not have any capacity problems. His study concluded that all the intersections would operate within congestion standards for the policy area, with the possibility that the Applicant might have to participate financially in certain roadway improvements that are being required in connection with a nearby Seventh Day Adventist project. *Id.* at 228-29. The

need for such participation would be determined at site plan or subdivision. Mr. Cunningham opined that the surrounding road system, considering the anticipated improvements, would provide a safe and efficient circulation pattern in the area. *Id.* at 229. He further opined that the development shown on the SDP would not have any adverse impact on area road conditions.

Mr. Cunningham acknowledged that the access for the subject property is directly across from the access to the Verizon facility to the north, but he was not aware of whether that is the primary access point for the Verizon site. Based on the traffic counts, he estimated that with the proposed expansion, the subject property would generate 38 vehicle trips entering the site during the morning peak hour, and eight vehicles exiting. The Verizon facility across the street would have 413 vehicles entering the site during the morning peak hour, and 46 exiting. *Id.* at 230. Mr. Cunningham opined that the proposed development would not create any ingress or egress problems on the subject site, noting that Musgrove Road has ample capacity.

Mr. Cunningham testified that Musgrove Road continues into the Stonecrest/Snowden's Mill area and ends within the subdivision. Thus, there would be no way for traffic going to or from the subject site to cut through the Stonecrest/Snowden's Mill neighborhood. His analysis concluded that none of the traffic to the subject site would come from Musgrove Road, supporting the further conclusion that the proposed development would have no adverse traffic impact on the adjoining neighborhood.

3. William Crowell, Applicant. Tr. March 28 at 130-144.

Mr. Crowell is one of the principals of the Applicant in this case. He and his partner own and operate several medical office buildings in Montgomery County and surrounding jurisdictions, including two near Suburban Hospital and one near Shady Grove Hospital. They have been involved in commercial development in Montgomery County for 40 years, and have built extensive commercial developments up and down the east coast, including most of the upscale communities in the Potomac area. They also serve as property managers for other owners of medical and commercial facilities. Mr. Crowell is also a member of the American Arbitration Association and has participated for many years in heavy construction litigation.

Mr. Crowell disputed the testimony at the hearing suggesting that the existing building on the subject property is a big, commercial-looking building. He feels that it is more residential than commercial in appearance, and looks like an apartment house or townhouses. Tr. March 28 at 135. Mr. Crowell stated that the building serves as a neighborhood medical facility, and most of the doctors need more space as their practice expands. The building has had an occupancy rate of about 98 percent since it opened, and some practices have had to leave because there was not enough room for expansion.

Going back to the original special exception approval, Mr. Crowell stated that when he and his partner purchased the subject property and started planning a medical office building on it, they also acquired the adjacent property (Lot 2) for additional space. Once the special exception was granted, the transportation planners felt the entrance had to be as far down at the west end of the property as possible. They were able to accomplish this on Lot 2, and amended the special exception to get approval for the site plan.

Mr. Crowell has observed significant changes in the area in the last 20 years, including an increase in traffic to the subject building from surrounding uses, especially the two Verizon facilities. There has also been a lot of townhouse and multi-family development to the north. Mr. Crowell noted that local residents have commented to the building management on how convenient it is to have medical offices available in the neighborhood. *Id.* at 139. Mr. Crowell stated that the building currently has nine medical specialties, and he is not aware of any other comparable medical office facility anywhere between White Oak and Burtonsville. *Id.* Moreover, some of the doctors in the building have mentioned that they know other physicians who would like to locate in the building.

Mr. Crowell stated that the house on Lot 2 has been vacant for some time, but he does not know how long. He described the plan to use that area for parking, which would be heavily landscaped so that the parking would be barely visible. Mr. Crowell stated that the owner of Lot 1, on the corner, has never complained to him about the access to the subject property or the use of Lot 5 (the main lot). He stated that the existing facility is not open in the evenings, and the parking lot lights are set to turn off at a certain time. A similar method would be used on Lot 2.



Mr. Crowell further testified, based on his experience in residential development, that it is unlikely that the subject property would be developed for residential use with the interchange improvements currently proposed by SHA. He stated that the ramps and retaining wall would make it very difficult to do anything residential on the property. Moreover, he has no plans to take down the existing building. Mr. Crowell also stated that SHA has contacted him about taking part of his property for the interchange improvements, and as far as he knows, they intend to go forward with those improvements.

In response to a question from the People's Counsel, Mr. Crowell testified that during the original approval process for the special exception, no member of Technical Staff told him that the structure had to be set back 100 feet from Route 29.

Finally, Mr. Crowell acknowledged that the building has never really been used as it was described during the original special exception proceedings. Holy Cross did master lease the building for a period of time, as anticipated, but they never installed an urgent medical facility as they had planned. Mr. Crowell stated, however, that some of the sports medicine and orthopedic practices in the building provide care for injured patients, almost serving as an emergency walk-in clinic. *Id.* at 144.

#### **B. MNCPPC Technical Staff**

1. Piera Weiss, Community Based Planning. Tr. March 18 at 155 – 185.

Ms. Weiss has been a planner in the Community Based Planning Division of the MNCPPC since 1989, prior to which she served as a landscape architect at MNCPPC for four years. Ms. Weiss has focused her work on the Fairland area of the County since 1989, and was the author of the Master Plan. She was designated an expert in land use planning and in the Fairland Master Plan, although Ms. Weiss acknowledged that she is not an expert in the definition of surrounding areas.

The Hearing Examiner requested that Ms. Weiss respond to the evidence that the Applicant presented concerning the proposed interchange improvements at the intersection of Musgrove Road and Route 29.

Ms. Weiss testified that one of the important elements of the Master Plan process was SHA's interest in including in that process an evaluation of interchanges from Burtonsville to New Hampshire Avenue. While the Master Plan was being prepared, the SHA was preparing an environmental impact assessment for Route 29, and including those interchanges improvements in the Master Plan would make it easier for them to get through the Federal Highway Administration's environmental impact process. As a result, much of the transportation analysis in the Master Plan focused on the various designs for grade-separate interchanges along Route 29. At the time, there were very few grade-separated interchanges in the relevant stretch of Route 29.

As the Master Plan process came to a close, SHA concluded its study and presented to all those involved in the process, including CAC members, the alternative it had chosen for the new interchanges. As a result, those involved in crafting the Master Plan knew that in many cases the east-west roads would be going over Route 29, and some would have full interchanges – allowing cars to exit in all four directions – while others would not. *Id.* at 159. It was also clear that a potential interchange between the Intercounty Connector and Route 29 would have a direct impact on the interchanges to the north and south of it because of ramping issues. That suggested that interchanges to the south would not necessarily be full interchanges, especially for roads that are not major east-west connectors. The major east-west connectors, like Randolph Road, the ICC, Briggs Chaney Road and Route 198 would have to be full interchanges. Musgrove Road, in contrast, is a very short stretch of road that would not likely be a full interchange.

In sum, Ms. Weiss stated, the Master Plan recommendations were prepared with knowledge of the planned Route 29 interchanges and their effects on the land. Tr. March 18 at 160-61. The drafters of the Master Plan did not consider a grade-separated interchange to be antithetical to residential development, and recommended housing in a couple of locations where there would be a ramp. *Id.* at 161. Moreover, Ms. Weiss noted that the Planning Board has recently approved a townhouse development at the location of the Fairland Road/ICC interchange, which includes ramps.

Ms. Weiss stated that the Master Plan did not make specific recommendations for the subject property, it simply stated what was already there. *Id.*

With regard to the neighborhoods identified in the Master Plan, Ms. Weiss observed that two of the communities do not extend over Old Columbia Pike to Route 29: Stonecrest/Snowden's Mill, and Rolling Acres, which is further south. She explained that the communities were identified based largely on interconnectivity between the various subdivisions, and in those two areas, the interconnected residential streets did not necessarily cross over Old Columbia Pike. *Id.* at 162-63. Ms. Weiss referred to the history provided in her staff report on this case regarding the different views of the Fairland area espoused in various master plans. She observed that the drafters of the 1997 Master Plan concluded that Route 29 should not continue to be perceived as a corridor, because in reality the whole area is a large residential area, with non-residential areas in certain places. She noted that the non-residential uses were put in place in the late 1960s and early 1970s, and a few in the 1980's after the 1981 master plan, which had a concept of transit serviceability along Route 29. *Id.* at 163-64. The 1997 Master Plan sought to turn that around and look for ways to strengthen the single-family residential aspect of the planning area.

Ms. Weiss explained that the vacant property south of the subject site was recommended in the Master Plan for rezoning to the R-200 Zone to make sure there would be a high proportion of detached housing. In response to Mr. Perrine suggestion that R-90 zoning could have been used with a limitation on the percentage of attached housing, Ms. Weiss stated that she tries to avoid being that specific about individual properties in a master plan. She considers it more appropriate to use general recommendations that will work with the Zoning Ordinance as it changes over time. *Id.* at 164-65. The goal was not to increase housing density, but to increase the proportion of detached housing.

With regard to the Master Plan's land use map and the percentage of land recommended for commercial use, Ms. Weiss stated that master planning does not focus on the availability of land for particular uses, such as a medical office building. The Master Plan provided for several employment centers in the Fairland area, where a whole host of activities can take place. The employment center at the intersection of Route 29 and Cherry Hill Road, for example, has over 500 acres of land, about 250 of which are currently vacant, where any kind of offices can be built. Another

employment area located at the intersection of Route 198 and Route 29 has about 50 acres of land. The Master Plan was not trying to provide for large amount of additional commercial zoning, because there was a lot of land available for redevelopment within existing commercial envelopes.

Ms. Weiss also addressed the potential impact of the proposed rezoning on the adjoining neighborhood. She noted that because the Planning Board required the access to be provided through the adjacent property, the existing special exception already has an impact on adjacent residential property that was considered during the special exception hearing. She also noted that the property at the corner of Musgrove Road and Old Columbia Pike was the subject of an earlier zoning application that was rejected for lack of conformance with the then-general plan. Ms. Weiss stated that intersections are always places where people want to change design. She expects that the owners of the corner property will eventually seek a rezoning, and that their case will be stronger if the subject property is zoned O-M.

Ms. Weiss reiterated her opinion that the rezoning proposed in this case would be inappropriate at this location and would have an adverse effect on the residential neighborhood to the west. She explained that the immediate concern was the increased likelihood that the corner lot would seek rezoning to a commercial zone, but that she also had a concern about any change that might have an adverse effect on the vacant land to the south.

Under cross-examination by counsel for the Applicant, Ms. Weiss acknowledged that at the time of the Master Plan preparation, there were no engineering plans available for the proposed Route 29 interchanges. She noted, however, that they did have elevations and a sense of where the retaining walls would be. She stated that the effect of the interchange improvements was discussed, in particular with regard to access to the subject property and the Verizon facility across the street. Ms. Weiss conceded that those discussions did not specifically refer to the possibility of a 22- to 25-foot wall running along two sides of the property. She stated that on southbound Cherry Hill Road there are two office buildings within feet of a retaining wall, and at Briggs Chaney Road there is an off-ramp with probably a 25-foot retaining wall to get onto Briggs Chaney. Ms. Weiss could not estimate

how far the buildings are from that particular wall. She agreed that although there are buildings 50 feet or less from the interchange with Route 198, there are no retaining walls. *Id.* at 175-76.

Ms. Weiss disagreed with the suggestion that it was a deficiency for the Master Plan not to consider whether its recommendations would provide space for medical services. She stated that master plans do not go into that level of detail. Ms. Weiss admitted that she was not positive whether zoning in the Fairland employment centers would support medical offices. She also stated that the Master Plan included specific zoning recommendations to provide for neighborhood retail uses and larger, big-box-type retail uses. *Id.* at 180.

In response to cross-examination about why she was not concerned about the impact on the neighborhood of the senior housing facility south of the subject site, Ms. Weiss stated that the building was approved as a special exception, and that the Planning Board and the Board of Appeals felt there was a higher good to be served by approving affordable, independent dwellings for senior citizens at this location. *Id.* at 183.

2. Sandra Youla, Development Review Division. Tr. March 28 at 11-109.

Ms. Youla has served as a zoning analyst with the MNCPPC since 1997. Prior to that she was a zoning analyst with a private consulting firm in Hong Kong, and prior to that a housing consultant, also in Hong Kong, spending a total of three or four years there. Ms. Youla has a Bachelor's Degree from Wellesley College in the history of architecture and the history of art, and a Master's Degree from the University of Pennsylvania in city planning. Ms. Youla was the author of the Staff Report in this case, which was drafted with input from various MNCPPC departments. She was not formally designated an expert witness, but in light of her experience and her position at the MNCPPC, her testimony is entitled to substantial weight.

Ms. Youla first clarified a minor discrepancy between the square footage numbers provided in the Staff Report for the existing building and the proposed addition, and the numbers on the SPD, which the testimony indicated has the most accurate numbers. Ms. Youla noted that the numbers in the Staff Report were based on those stated in the Applicant's earlier written submissions.

The difference between the figures is quite minor, and Ms. Youla stated that it had no impact on her analysis. Tr. March 28 at 20-21.

To explain her recommendation for the surrounding area in this case, Ms. Youla presented an aerial photograph with zoning district lines marked. She noted nearby uses including the Verizon complex to the north and the additional Verizon facility diagonally across Route 29 to the northeast, both of which are very large tracts. The one to the north is classified under the I-3 Zone, and the one to the northeast is in the O-M Zone. Ms. Youla noted that west of Old Columbia Pike are residential subdivisions in the R-200 and R-90 zones, with some R-150 zoning, but substantially all single-family residential. South of Musgrove Road, Ms. Youla identified single-family residential zoning, with the R-90, R-90/TDR and R-200 zones represented. Further south along Randolph Road is an area of C-1 zoning. Immediately south of Randolph Road is O-M and I-1 zoning, occupied by the Seventh Day Adventist headquarters and the Cherry Hill employment center. Beyond that is more residential zoning.

Ms. Youla testified that the master plans for this area had changed over time. Earlier master plans viewed the land area abutting Route 29 as a corridor, with the potential to be developed as a corridor city. She explained that very often, land abutting a major artery relates to the kind of traffic on that artery, which may be through traffic flowing from another region, and may not travel to areas off that artery. The current Master Plan rejected that concept and tried to establish, for the block that includes the subject site, a stronger relation to the single-family neighborhoods on either side of Route 29 than to the non-residential uses to the north.

Ms. Youla placed a great deal of weight on the Master Plan analysis and recommendations in determining the appropriate surrounding area for this case. She saw from the zoning patterns that the Master Plan was trying to establish a single-family character on the east and west sides of Old Columbia Pike, near and including the subject site, and that the Verizon facilities were to be contained, relating more to one another than to the surrounding uses. Moreover, the Verizon property to the north is separated from the neighborhood by green area along its perimeter and a very large parking lot. The Verizon site to the northeast is a campus setting, with the building

and parking surrounding by a vast green area. In light of these factors, Ms. Youla determined that development of the subject property would have little impact on the two Verizon properties. *Id.* at 26-29. She specifically defined the surrounding area as the R-90 and R-200 properties within the subject street block, because she felt the proposed development would have the most direct impact on these properties. Ms. Youla acknowledged that any site has impact to varying degrees on different properties, some near and some close, but based on the strategic importance of the subject lot, she felt that the most direct impact would be on residentially-zoned properties in the area. Tr. March 28 at 27-28.

Ms. Youla used Route 29 as an arterial dividing line for her surrounding area because of its width. *Id.* at 29.

Ms. Youla noted that the surrounding area contains two residential buildings, a vacant one on Lot 2, which is part of the subject site, and an occupied residence on the adjacent Lot 1. She testified that the vacant R-200 land south of the subject property could be developed with approximately 20 houses. She also noted that for drivers heading west on Musgrove Road into the residential subdivision west of Old Columbia Pike, the subject property is at the entry to the neighborhood, forming a visual transition. Old Columbia Pike was kept as a narrow road, with sidewalks, to reinforce its residential character. Ms. Youla characterized all the existing uses along that stretch of Old Columbia Pike as either complimentary to single-family residential development, uses that are permitted by right (i.e., the two religious institutions), or special exception uses that have been deemed compatible. *Id.* at 30.

Ms. Youla did not extend the surrounding area across Old Columbia Pike because she felt that only the areas of most direct impact should be included, consistent with general practice in zoning cases.

With regard to the opinion in the Staff Report that the proposed rezoning would have an adverse effect on the “adjoining neighborhood,” Ms. Youla testified that when she used that term in the Staff Report, she meant the area within the subject street block that she defined as the surrounding area. *Id.* at 32. A member of the Planning Board suggested that the term “adjoining

neighborhood” in the purpose clause could also refer to the adjoining Stonecrest/Snowden’s Mill neighborhood, and she agreed with Stuart Rochester that the proposed rezoning would have an adverse impact on that neighborhood. Ms. Youla anticipated adverse impacts on other properties within the surrounding area as she defined it, including the possibility that the vacant property south of the subject site, or the residential property on the southwest corner of Musgrove and Route 29, would seek rezoning or a large, intense special exception. Changes of that kind would have an adverse impact because they would be contrary to the master plan goal of trying to maintain a single-family residential character in this area, in part by keeping the subject block relating to the single-family uses west of Old Columbia Pike.

Turning to the potential impact of the proposed rezoning on the adjacent Stonecrest/Snowden’s Mill community, Ms. Youla observed that a “gateway site” like the subject property sets the visual tone for a neighborhood. She fears that if the zoning were changed, it would set in motion the idea that the rest of the properties in the area could also be non-residential.

Ms. Youla noted that in Staff’s experience, regardless of whether rezonings are supposed to serve as precedent, they do. One rezoning tends to lead to another, and even with special exceptions, there is a tipping point beyond which the character of the area starts to change.

Ms. Youla also feels that the bulk of the existing building and the addition would have adverse impacts. It is already a very large use with a non-residential appearance, and additional bulk would make it even more non-residential, rather than containing it as is.

Addressing the impact of the potential improvements to the Musgrove Road/Route 29 intersection, Ms. Youla stated that the Master Plan drafters knew there would be ramps of some sort, and still rejected the property owner’s proposal for O-M zoning. The evidence presented in the hearing about ramps and retaining walls does not change Ms. Youla’s view that the proposed rezoning would set a negative precedent for other rezonings in the area. Ms. Youla does not expect the subject property to revert to residential use, but would like to see it developed in a manner that is compatible with single-family residential character.



Ms. Youla was asked various hypotheticals under cross-examination by Applicant's counsel, but she declined to offer an opinion on them without the opportunity to consult with her colleagues or perform a detailed analysis. She rejected the suggestion that when she stated in the Staff Report that the intensity of the use is excessive for a predominantly single-family residential area, she was in essence agreeing with Mr. Perrine that it is the uses that establish the character of an area. Tr. march 28 at 44. Instead, Ms. Youla stated that both zoning and uses establish character, and one cannot be considered without the other. She did concede that the average person driving by would have no idea what the zoning classifications were, but would be able to recognize the nature of the existing uses.

Ms. Youla testified that she did not calculate what percentage of her surrounding area was developed with or zoned for single-family use. She based her assessment as to whether the area was predominantly single-family residential on a visual analysis of the aerial photos, noticing two small lots with single-family homes, a large undeveloped tract zoned for single-family use, two religious institutions and a senior housing facility. Ms. Youla agreed that "predominantly" single-family residential means mostly, or more than 50 percent. She acknowledged that the largest uses in her surrounding area are the medical clinic on the subject site, the two religious institutions and the senior housing. There is also a large tract of vacant land. Ms. Youla conceded that uses she had identified were predominantly non-residential. *Id.* at 51.

Applicant's counsel asked Ms. Youla, in light of the statement in the Staff Report that the proposed intensity of use is excessive, whether she would consider R-90 single-family residential development to be excessive intensity of use next to R-200 residential development. Ms. Youla replied that R-90 zoning is located adjacent to R-200 zoning in many locations in the County, and does not result in excessive intensity of use. Ms. Youla agreed that the subject property, if vacant, could be developed under the R-90 Zone with 9,000-square-foot lots and 3,000-square foot homes, producing an FAR of .33 (Ms. Youla noted, correctly, that FAR is not normally discussed in relation to residential development). She acknowledged that the SDP in the present case provides for a maximum FAR of .34, which is very similar to what could be built under R-90 standards.

Cross-examination continued with questioning related to the senior housing facility south of the subject site. Ms. Youla was asked to review the general neighborhood as set forth in the Hearing Examiner's report for the special exception that approved that facility. In so doing, she noted that it extended to Randolph Road to the south, and across Route 29 to the east. Ms. Youla declined to speculate as to why the general neighborhood was defined differently in that case from the surrounding area she suggests here. *Id.* at 58-60. After reviewing the dimensions and number of rooms, Ms. Youla agreed that .37 was a reasonable estimate of the FAR in the senior housing facility, a level slightly higher than proposed in this case. Ms. Youla acknowledged that the building proposed in this case is smaller than the senior housing facility. *Id.* at 62-67, 73-77. She conceded that the two-story senior housing facility is, in fact, 35 feet high, which is only one foot lower than the existing and proposed buildings in the present case. She further conceded that the building coverage proposed in this case is less than half of the level that was approved for the senior housing.

Ms. Youla acknowledged that the Technical Staff and Planning Board recommendation in the special exception case for the senior housing (which Ms. Youla did not write) concluded that the property was recommended for R-200 zoning in the Master Plan, and housing for the elderly is allowed by special exception in that zone, so granting the special exception would be consistent with the land use objectives of the Master Plan. Applicant's counsel questioned Ms. Youla as to how Staff and the Planning Board could have concluded that the senior housing special exception was consistent with the Master Plan if, as she and Ms. Weiss maintain, one of the plan's key objectives was to preserve the *single-family* residential character of the area. Ms. Youla stated that she was not involved in the senior housing case, but based on other testimony (from Ms. Weiss), Staff and the Planning Board felt that the senior housing would serve an important public purpose, and this weighed heavily in their consideration. *Id.* at 70. Ms. Youla had no opinion as to whether senior housing or accessible medical services should be considered more important to the public interest. *Id.* at 73.

She also noted that the subject property in this case is on a corner, near two existing single-family dwellings, that leads directly into the adjacent single-family subdivision, and that the use is non-residential. At least the senior housing is a residential use, although not single-family.

Moreover, Ms. Youla observed that only the front of the senior housing facility (one leg of the “E”) is visible from Old Columbia Road. The rest is not visible from off site, so from Old Columbia Road it appears smaller than it is.

Applicant’s counsel questioned Ms. Youla about the statement in the Staff Report that the building setback proposed in this case would disrupt the setback established along Route 29. Ms. Youla conceded that the setback she referred to was not established in the Master Plan, or any public planning document approved by the County Council, but is simply a setback that has been established through the application of various special exceptions and rezonings in the area. She notes that the memorandum from Community Based Planning that is attached to the Staff Report specifies that the existing 100-foot setback for the existing building on the subject site matches the building setback for the Verizon site on the west side of Route 29 and for the industrial park to the south, thus maintaining a consistent building setback along Route 29. The proposed addition would be set back only 48 feet from Route 29. Ms. Youla conceded that the minimum building setback in the R-90 Zone is 30 feet, and that it is uncertain how the County would enforce a requirement for a much larger setback that has been established by practice. *Id.* at 80-82. Normally, a property owner would be informed of the larger setback expectation during the process of site plan review. *Id.* at 82.

Ms. Youla declined to agree with the suggestion that the setbacks wouldn’t matter if the retaining wall were built, noting that the top of the building would still be visible. She testified that a motorist heading south on Route 29 from Musgrove Road to Randolph Road would see the three-story building on the subject property, then an open field, then a wooded area, then the senior housing facility (Ms. Youla did not know whether any landscaping had yet been installed that would screen the facility), then an area with roadway improvements under way. Ms. Youla agreed that the residences in Stonecrest/Snowden’s Manor are not visible from Route 29.

Ms. Youla acknowledged that the existing uses in the property zoned C-1 near Randolph Road are, for the most part, neighborhood commercial uses that can serve the residents, employees and businesses up to Musgrove Road and beyond to the Verizon facilities. She agreed that there is an interrelationship between this commercially zoned area and other uses in the

neighborhood. *Id.* at 89. Ms. Youla conceded that the Master Plan map that identifies “communities” in the Fairland area places the subject property in a community that extends from Fairland Road on the north all the way to Randolph Road, including the C-1 commercial area. Ms. Youla explained that she has never suggested that commercial area is not part of the overall neighborhood. She excluded it from the surrounding area for this case because she felt those properties were not among those most directly affected by the proposed rezoning. *Id.* at 90-91.

Ms. Youla acknowledged that it is common practice in master plans, where a special exception already exists, to reconfirm the underlying zoning that supports the special exception, as was the case here. She also confirmed that property owners frequently request particular zoning recommendations when master plans are being prepared, as the owner of the subject property did in 1997. She testified that she researched the reasons that were articulated at that time for the denial of that request, and found that those reasons were legitimate and remain applicable today. *Id.* at 94-95.

Ms. Youla agreed that if the proposed rezoning is granted, there is nothing to prevent the owner of the vacant land to the south from developing it with single-family homes. She is not aware of any plans to do so, and continues to believe that a successful commercial rezoning would send a signal that the area is not considered predominantly single-family residential, encouraging other property owners to propose commercial development. This conclusion is based on her experience in observing changes in neighborhoods over time, particularly on arterial roads.

Ms. Youla testified on continued cross-examination that the proposed interchange improvements at Musgrove Road and Route 29 would make the subject property more shielded from view than it is currently, and more exposed to traffic from cars rising up above ground level. Tenants in the building would have less light and the views from many of the windows would be changed.

### **C. Community Opposition**

The only community member who participated in the hearing was Stuart Rochester, Chairman of the Fairland Master Plan Community Advisory Committee. Mr. Rochester testified, as noted in his written submission, that the CAC considers the subject property to be an important parcel in retaining the residential character of the neighborhood. He described the adjoining residential

neighborhood as under siege for “all manner of special exception, rezoning applications, and creeping commercial and institutional uses.” Tr. March 18 at 196. Mr. Rochester suggested that the Applicant’s characterization of the surrounding area as no longer a single-family neighborhood underscores the fragility of this community.

Mr. Rochester stated that if the subject property were on Route 29 there would be no issue, but it is in fact located on Musgrove Road, within a stone’s throw of Old Columbia Pike, on a road that functions as a gateway into the residential community to the west. He noted that the residential property on the southwest corner of Musgrove Road and Old Columbia Pike (Lot 1) provides visual relieve from the intensive uses on Route 29, as does the extensive buffer along the Verizon facility to the north. Mr. Rochester noted that the Master Plan emphasized the importance of keeping the east side of Old Columbia Pike, which confronts a single-family neighborhood across a two-lane road, in residential use, or at least compatible in scale. He stated that the community spent a tremendous amount of time working with the developer of the senior housing facility to the south to make sure that building would be compatible in scale, but that the building turned out to be over-sized, partly because SHA requirements related to Route 29 caused a lot of the frontage to disappear. Mr. Rochester stated that as built, the facility looms larger than depicted in the designs that were shown to the community. He also emphasized that the facility is a residential use, and noted that the developer decreased the height from three stories to two in response to community concerns.

With regard to the potential interchange improvements at Musgrove Road and Route 29, Mr. Rochester stated that the Master Plan recommends monitoring the impact of the significant grade separation at Route 198/Route 29 and Randolph Road/Route 29 on upstream and downstream intersections, as well as on east-west circulation, as compared with the expected operational improvements. *Id.* at 198-99. He noted that the results of that monitoring may change the cost-effectiveness of other improvements and affect whether other grade separations should be constructed. As a result, Mr. Rochester considers the nature of the improvements that might be built at Musgrove Road and Route 29 uncertain.

Mr. Rochester emphasized that this neighborhood has reached a tipping point. He stated that the proposal to rezone the subject property to O-M was inappropriate when the property owner suggested it during the Master Plan process, was rejected at that time (with even the development representatives on the CAC voting to turn it down) and remains inappropriate today. *Id.* at 199-200. He observed that with the passage of time and the intrusion of other threats to the “sense of place” on Old Columbia Pike, from the ICC and roadwork on Route 29, this site has acquired even more significance as a highly visible transition parcel that is key to preserving the integrity of the residential community. He urged the Council to accept the unanimous position of the CAC, the strong recommendation of Technical Staff and the recommendation of the Planning Board to deny the rezoning.

Under cross-examination by the Applicant’s counsel, Mr. Rochester testified that if the house on the southeast corner of Musgrove Road and Route 29 (Lot 1) were to seek a special exception for office use, even if the house did not change at all, he would be opposed. He explained that his concerns are related to both the structure and the use, noting that if a use can be compatible in appearance in scale, those factors mitigate in favor of supporting it. Nonetheless, he would object to any non-residential use of the corner house, in the context of the other non-single-family uses that have been occurring. Part of Mr. Rochester’s concern is that such a use would eventually have an impact on the zoning, if not of that property, of other properties nearby, because changes in zoning and in permitted uses start to change to the character of the neighborhood. *Id.* at 201-202. He is worried not only about the house on the corner, but about the larger neighborhood, which he believes is in danger of being fundamentally transformed by any further changes in the zoning fabric of this area. Mr. Rochester agreed that the house on the corner is currently the only residence in the surrounding area outside of the subject property, although he added that he hopes it will not be the last one. He is not aware of any plans for development of the vacant property south of the subject site. He emphasized, however, that he believes the proposed rezoning, if approved, will “completely change the complexion of the other properties and . . . an opportunity to develop a single family [use] will have been diminished.” *Id.* at 203.

Mr. Rochester stated that he was representing the Fairland CAC at this hearing. He described the CAC as an advisory body that has been recognized multiple times in County Council Resolutions and by the Planning Board, as a community organization that remained in existence after the adoption of the 1997 Fairland Master Plan to make sure the plan was implemented. He stated that the CAC currently has six members and meets on approximately a quarterly basis, or as necessary. Mr. Rochester noted that decisions are made on a consensus basis, and that all of the members were aware of his participation in this hearing. He explained that the case was discussed via email, and that all the members who were in town during that period authorized him to participate in this case in defense of the Master Plan.

Under continued cross-examination, Mr. Rochester agreed that the provision of easily accessible medical services for a community is important. He stated that the Master Plan refers generally to the importance of community facilities and services, and provided for possible uses in existing employment areas. Mr. Rochester noted that Kaiser Permanente is located among other medical facilities in the Calverton area, and that the community has worked with the senior housing facilities to provide van service to local medical facilities. He also noted that although White Oak is narrowly outside the planning area, its medical facilities are very close by van. Mr. Rochester stressed that there are many uses that the Master Plan did not specifically provide for, but at the same time there was no intention to limit locations for such facilities in the planning area. He stated that he does not know the locations of all nearby medical buildings similar in size to the subject use, but he knows there are medical offices in Burtonsville at the corner of Route 198 and Route 29, as well as many medical facilities in the White Oak area and the Lockwood area, all within two to three miles of the subject site. *Id.* at 213-214. Mr. Rochester noted that he believes there are also medical offices on Randolph Road, concluding that there is no shortage of nearby medical facilities in the Fairland area.<sup>7</sup>

Mr. Rochester further explained that the “visual relief” that he referred to, both in writing and in his testimony, for those driving south on Old Columbia Pike, is provided not only by Lot 2, the

residential parcel at the southwest corner of Musgrove Road and Old Columbia Pike, but also by Lot 1, the portion of the subject site that currently has a vacant residential building and yards. He characterized the visual impact of Lot 1 as “clearly residential,” and critical to the sense of space and residential character in the area. He noted that it is precisely because Route 29 is so invasive that the Master Plan tried to retain the existing scale and character along Old Columbia Pike, so that it would not become another divider within the neighborhood. Mr. Rochester acknowledged that a motorist driving south on Old Columbia Pike would see the proposed addition only when approaching the Musgrove Road intersection, and that the addition would be sited closer to Route 29 than to Musgrove Road. *Id.* at 216-217. He acknowledged that he has no expectation that the existing medical building on the subject property will be demolished and replaced with single-family detached housing.

On continued cross-examination, Mr. Rochester elaborated on the process that led to the construction of the senior housing facility south of the subject site. He stated that the design that the community supported during the approval process was based on a reduction from three stories to two, and included a very attractive, circular driveway, well landscaped, with a significant piece of frontage on Old Columbia Pike that would have been compatible with the neighborhood. The final design was very different, partly because of larger than expected takings by SHA, and the building ended up closer to Old Columbia Pike, without the beautiful drive and landscaping. It also turned out to be more massive in appearance than was represented to the community. *Id.* at 220-21.

## **V. ZONING ISSUES**

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks, and building height.

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<sup>7</sup> Applicant’s counsel pointed out that the one in White Oak are in a different planning area. The Hearing Examiner fails to see the relevance of this distinction in the context of this application.



A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, i.e., it satisfies the purpose clause for the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

Montgomery County has many floating zones, including the R-T Zones. The R-T 8 Zone contains development standards and a post-zoning review process that delegate to the Planning Board site specific issues such as building location, landscaping and screening. The application of the zone to the subject property involves an evaluation of eligibility under the purpose clause, compatibility with existing and planned land uses in the surrounding area, and relationship to the public interest.

#### **A. The Purpose Clause**

The purpose of the O-M Zone as stated in Code §59-C-4.31 is set forth in full below.

It is the purpose of the O-M zone to provide locations for moderate-intensity office buildings in areas outside of central business districts. It is intended that the O-M zone be located in areas where high-intensity uses are not appropriate, but where moderate intensity office buildings will not have an adverse impact on the adjoining neighborhood. This zone is not intended for use in areas which are predominantly one-family residential in character.

The fact that an application complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the application is, in fact, compatible with surrounding land uses and, in itself, shall not be sufficient to require the granting of any application.

The present application readily satisfies the first sentence of the purpose clause because the site is not within a central business district. Mr. Perrine parsed the remainder of the first paragraph of the purpose clause in a manner that clearly elucidated the requirements. (Tr. March 28 at 109-112). These requirements may be summarized as follows:

- ◆ The word “area” refers to the area where O-M zoning is being proposed, and should be considered coextensive with the designated surrounding area.

- ◆ The term “adjoining neighborhood” refers to or includes, in this case, the entirety of the Stonecrest/Snowden’s Mill community on the west side of Old Columbia Pike.
- ◆ O-M zoning is intended for areas:
  1. that are not appropriate for high-intensity uses;
  2. that are not predominantly single-family residential in character; and
  3. where moderate intensity office buildings will not have an adverse impact on the adjoining neighborhood.

Reviewing the three characteristics of areas where the O-M Zone is intended, the Hearing Examiner and all parties agree that the surrounding area is not appropriate for high-intensity uses.

As discussed in detail in Part III.B. above, the Hearing Examiner is in agreement with the Planning Board that at least the eastern edge of the Stonecrest/Snowden’s Mill community should be considered part of the surrounding area for this application. As a result, the surrounding area can properly be considered predominantly single-family in character. Accordingly, the O-M Zone is not appropriate for the proposed location.

The evidence also supports the conclusion drawn by the Planning Board and Technical Staff that the proposed moderate intensity office building would have an adverse impact on the adjoining neighborhood.<sup>8</sup> The Planning Board stated specifically that the purpose clause allows the effect on the *adjoining* neighborhood to be considered in gauging adverse impact, therefore the impact on the Stonecrest/Snowden’s Mill community should be considered relevant. The Applicant stressed that the building addition would barely be visible from any part of the adjoining residential neighborhood except the intersection of Musgrove Road and Old Columbia Pike, and that the expanded parking area would be screened by setbacks, vegetation and, if the Planning Board so directs at site plan, fencing. However, as pointed out by Technical Staff, the existing building already

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<sup>8</sup> Ms. Youla testified that her use of the term “adjoining neighborhood” in the Staff Report was essentially synonymous with “surrounding area.” Nonetheless, the Staff Report contains many findings related, directly or indirectly, to the impact of the proposed rezoning on the Stonecrest/Snowden’s Mill Community. The Hearing Examiner makes use of some of these findings in this discussion.

is large compared to nearby residences and religious structures, most of which are one or two-story buildings; additional bulk is neither warranted nor compatible. The illustrative 20-foot parking lot setbacks shown on the SDP are not large enough to provide a significant buffer. More importantly, the proposed rezoning would increase the intensity of use on the site in a way that would be incompatible with the adjoining single-family neighborhood.

The 1989 zoning text amendment discussed earlier, which sharply limited the size of medical clinic special exceptions, demonstrated a policy decision on the part of the County Council that large medical clinics/office buildings were not appropriate in residential neighborhoods. That amendment very specifically allowed existing clinics to continue operating as special exceptions, but prohibited the Board of Appeals from approving any building expansions. The Applicant here seeks to circumvent that prohibition by securing a zoning classification that would obviate the need for a special exception. The Applicant has not, however, succeeded in persuading the Hearing Examiner that the building addition proposed here would avoid the adverse neighborhood impacts that the 1989 ZTA sought to control. The addition would bring an increase in the size of the structure, the amount of land covered by parking spaces, and the on-site activity levels. All would increase the pressures to which the Stonecrest/Snowden's Mill community is already subjected. Moreover, enlarging the parking lot onto Lot 2 would remove an important buffer/transitional parcel that currently eases the transition from Route 29 and commercial uses to the adjoining single-family detached community, and would remove a bit of "visual relief" from the many intense uses in the area.

Technical Staff and Mr. Rochester argued persuasively that approval of the proposed rezoning and expansion of the existing commercial use to Lot 2 would increase the pressure for commercial development on Lot 1 (on the corner of Musgrove Road and Old Columbia Pike) by removing most of the buffer that it currently enjoys from the commercial use on Lot 5. Lot 1 would see its neighbor change from a lot that is unoccupied, but from a visual standpoint is clearly residential, with very low levels of activity, to a parking lot serving a busy office building, with much higher levels of activity and attendant noise and odors. Fencing and landscaping can provide a visual and, to some degree, noise buffer between a residential use and a commercial one, but unless the setbacks and

landscaping are quite extensive – like at the Verizon site north of Musgrove Road – an adjacent residential use will not be totally shielded from the adverse effects of juxtaposing differing land uses. These effects are expected and acceptable in an urban setting, where a mix of uses adjacent to one another is part of the urban landscape, but in a suburban context, they are unexpected and, therefore, more acutely felt.

The Hearing Examiner is persuaded by the Planning Board, Technical Staff and Mr. Rochester that approving the subject rezoning would pose a real danger to the continued residential use of Lot 1, both because of an increase in direct adverse effects, and because the rezoning would add to the non-residential pressures in the area. Applicant's counsel and Mr. Perrine went to great pains to point out that each zoning case must be decided on its own merits, without regard to whether other nearby properties have succeeded in securing similar zoning. At the same time, however, one of the arguments raised by the Applicant's counsel and witnesses in favor of the present application is that two properties near the subject site were rezoned to O-M under similar circumstances. Applicant's counsel and Mr. Perrine referred to these cases to support their analytical arguments, but they also relied on the existence of other O-M property in the area to provide general support for their argument that O-M zoning would be appropriate on the subject site. Moreover, it cannot be denied that although each floating zone case must stand or fall on its own merit, changes in zoning and land use will, over time, change the character of an area in a way that affects what may be considered compatible in that area – increasing numbers and intensity of non-residential uses will tend to make the area appear more appropriate for other, similar uses.

The Hearing Examiner is also persuaded that if Lot 1 were to change to a non-residential use, an important transitional parcel and buffer would be gone. This would change the character of the Stonecrest/Snowden's Mill community, particularly the homes fronting on or close to Old Columbia Pike, by creating direct exposure to a continuous string of non-residential uses.

For all of the above reasons, the Hearing Examiner concludes that the proposed rezoning does not satisfy the purpose clause of the O-M Zone because the proposed use would have

adverse effects on the adjoining neighborhood, and because the surrounding area is predominantly single-family residential in character.

### **B. Compatibility**

An application for a floating zone reclassification must be evaluated for compatibility with existing and planned land uses in the surrounding area. As stated by the Planning Board, compatibility with the adjoining residential neighborhood is a very important factor in this case:

[T]he argument is persuasive, as put forth by a community member, that the subject site is a gateway to the single-family residential area and thus the site's land use and development should be compatible with single-family residential character.

Ex. 31 at 2.

The Applicant argues that the proposed use would be compatible with existing and planned uses in the surrounding area because the structure would be much smaller than the Verizon buildings, within the height limit for both the R-90 and R-200 zones, well buffered and significantly smaller than the senior apartment building south of the site. The Hearing Examiner is not persuaded

One of the Verizon facilities is completely excluded from the Hearing Examiner's designated surrounding area. The other is included, but with the recognition that only the part closest to Musgrove Road – part of the parking lot – would actually be affected by the proposed rezoning. Moreover, the Hearing Examiner is not persuaded that being smaller than the senior apartment building should play a large role in compatibility. The evidence established quite clearly that the senior apartment building was approved because of a need for affordable, independent housing for seniors, and that its final design was nothing like the design that was originally approved, which would have presented an appearance much more compatible with the confronting residential community.

The Applicant maintained that the vacant properties to its south would not be affected by the proposed rezoning and expansion. In the immediate sense, this is undoubtedly true, as these properties see little to no use during the weekday, when the subject building is most active. However, the Hearing Examiner is persuaded that intensification of the commercial use on the subject site

would make development on the vacant land that is consistent with the Master Plan's objectives less likely.

For all of these reasons, as well as those stated in the previous section, the Hearing Examiner concludes that the proposed rezoning and development would not be compatible with existing and planned land uses in the surrounding area.

### **C. Public Interest**

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“ . . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities. In this case, the Applicant has raised an additional public interest argument, which will also be addressed.

The Planning Board and Technical Staff opined that the proposed development would not be consistent with the Master Plan, and the Hearing Examiner agrees. Although the Master Plan's land use plan used a commercial designation for Lot 5, it apparently did not so designate Lot 2. Moreover, Ms. Weiss, the principal author of the Master Plan, testified that that designation was just a recognition of the existing use, not a recommendation for future use. Moreover, the description of the subject property in the text explicitly referred to the 1989 ZTA that made the existing use undesirable in a residential neighborhood. The clear objectives of the Master Plan to retain single-family zoning and encourage more single-family detached housing would not be promoted by spreading the existing commercial activity to Lot 2 and providing permanent authorization for commercial activity.

The Applicant made some interesting arguments about why the Master Plan's objective of increasing single-family detached housing should not be used to block the present application, but the Hearing Examiner did not find them persuasive. Mr. Perrine may quarrel with whether downzoning a large, vacant tract from R-90 to R-200 is the best way to promote single-family detached development, but Ms. Weiss had a logical, reasonable explanation for that recommendation, which the Hearing Examiner found persuasive. See Master Plan discussion in Part III.F. above. Even if Mr. Perrine were correct that the downzoning was not necessary, a minor strategic error of that nature would not compel a decision-maker to set aside the Master Plan's objectives without good reason.

Ms. Weiss also provided a logical, reasonable explanation for why the Master Plan did not specifically provide for medical offices. The Applicant's argument that the Master Plan's most important objectives should be ignored because only a small area was recommended for zoning that would support this specific use is unpersuasive. First, the evidence was not sufficient to establish that the amount of land allocated for office-friendly zoning was deficient. The Applicant presented evidence that only three percent of the planning area was recommended for zoning that would support medical offices, but offered no evidence indicating what percentage would be appropriate, e.g. what percentage has typically been provided in other master plans, or what percentage of the County's commercial land is occupied by medical office buildings. The Applicant relied on inference, which in this case was not enough. Second, even if there were sufficient evidence of a deficiency, that deficiency would not necessarily be enough to warrant ignoring the Master Plan's chief objectives.

Ms. Weiss testified persuasively that the *1997 Fairland Master Plan* sought to effect a change in the area of the subject property: from allowing continued growth of non-residential uses along Old Columbia Pike to encouraging single-family detached housing, or at least uses that are compatible with such housing. The evidence indicates that so far, this Master Plan goal has not been implemented in the block in which the subject site is located. In fact, as the Applicant pointed out repeatedly, the only new development in that block since the Master Plan was adopted is not single-

family detached housing; it is an apartment building for low-income seniors. However, the approval of that use was based largely on a need for affordable housing for seniors, which was considered an overriding public policy interest. Moreover, both Technical Staff and the Planning Board still believe that the Master Plan's vision has a chance to succeed, and should be supported. Under the circumstances of this case, the Hearing Examiner finds their recommendations persuasive.

The evidence supports a finding that the proposed development would have no adverse impact on traffic or local roadways. The new trips anticipated would not be sufficient to cause the planning area to exceed the accepted level of critical lane volumes. On that basis, Technical Staff opined that that LATR would be satisfied. In addition, the SDP includes a binding element that commits the Applicant to providing whatever traffic mitigation "applicable governmental authorities" may require.

The Applicant argues that SHA's plan to build an above-grade interchange at Musgrove Road and Route 29 makes the subject property unsuitable for residential use, and justifies the requested rezoning. The Hearing Examiner is persuaded that if the interchange is built as shown on the plans and computer simulations in the record, the property is very unlikely ever to be used for residential purposes. However, that provides only limited support for the proposed rezoning. Assuming that the interchange will be built, leaving the subject property as a special exception that cannot expand is more likely to support the goal of increased single-family detached housing than granting the requested rezoning, which would place Lot 2 clearly in commercial use and allow a considerable intensification of the overall use.

The Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification and development would have no adverse effect on public facilities that warrants denial of the application, and that the potential interchange improvements, alone, do not justify the requested rezoning.

The Applicant argues that although community need for a particular use is not formally a factor in rezoning cases, evidence of such a need demonstrates that the rezoning would be in the public interest. Planning Board Commissioner Bryant, the dissenting member of the Board in this



case, agreed with this position. He felt that if the rezoning were approved, “the effect would not be as adverse on any definition of community as staff and community members represented.” Ex. 31 at 2. In addition, Commissioner Bryant was persuaded by the demographics of the community that the proposed facility is needed. He felt that although need is not a standard finding in a floating zone case, considering need was part of the Planning Board’s responsibility. Commissioner Bryant also noted that master plan should be viewed as guidance only. See *id.* at 3.

There can be no question that, in general, ready availability of medical care, including in medical office buildings, is in the public interest. However, the Applicant did not succeed in demonstrating, by a preponderance of the evidence, that there is actually a need for medical services in the Fairland area that would be served by the proposed expansion, and otherwise will go unserved or be under-served. The Applicant’s testimony about the need for additional medical offices was largely anecdotal and not very specific. It was at least equally balanced by the testimony of Mr. Rochester, who lives in the Fairland area, that plenty of medical offices are available within a few miles of the subject site.

The Hearing Examiner concludes, based on a preponderance of the evidence, that the public interest in promoting the implementation of a duly adopted Master Plan outweighs the public interest in permitting the expansion of the medical office building in question.

For all of the reasons stated above, the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed reclassification and development do not bear sufficient relationship to the public interest to warrant their approval.

## **VI. CONCLUSIONS**

Based on the foregoing analysis and after a thorough review of the entire record, I make the following conclusions:

1. The application does not satisfy the requirements of the purpose clause.
2. The application proposes a form of development that would not be compatible with existing and planned land uses in the surrounding area.

3. The requested reclassification to the O-M Zone does not bear sufficient relationship to the public interest to justify its approval.

## **VII. RECOMMENDATION**

I, therefore, recommend that Zoning Application No. G-831, requesting reclassification from the R-90 Zone to the O-M Zone of 3.5 acres of land known Lot 2 and Lot 5, Thompson's Addition to Deer Park, 2415 and 2409 Musgrove Road, Silver Spring, Maryland, in the 5th the Election District, be **denied**.

Dated: June 27, 2005

Respectfully submitted,

Françoise M. Carrier  
Hearing Examiner